THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

Roger M. Young, Circuit Court Judge

Case Nos. 2014-GS-10-00763
2014-GS-10-00765 and 2014-GS-10-00767

Appellate Case No. 2018-000981
Opinion No. 5537, Filed February 14, 2018

The State, ... Respondent,

v.

Denzel Heyward ..... Petitioner

PETITION FOR WRIT OF CERTIORARI

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June 8, 2018.

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Certificate of Counsel

Counsel for the Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on April 26, 2018.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in affirming the admission of identification evidence obtained through successive, unduly suggestive photo line-ups in which the Petitioner was the only repeated subject, where the trial court did not consider the Neil v. Biggers reliability factors bearing on the reliability of the identification, but instead relied on the "credibility" of an eyewitness's testimony at trial?
2. Did the Court of Appeals err in holding that Petitioner's counsel opened the door to previously-excluded testimony related to domestic violence by the Petitioner towards a testifying co-defendant, where the Petitioner's counsel asked the co-defendant's mother about an unrelated allegation of sexual assault made by the co-defendant against the co-defendant's step-father?

STATEMENT OF THE CASE

Denzel Heyward ("Petitioner") was charged with four counts arising out of an incident on John's Island on May 16, 2012. The counts were for (1) the Murder of Kadeem Chambers; (2) the Attempted Murder of Jujuain Hemingway; (3) Armed Robbery; and (4) Possession of a Firearm During the Commission of a Violent Crime. R. pp. 9-14. Mr. Heyward's co-defendant, Deshaun Simmons, was indicted on virtually identical counts. The matter was tried from November 10th through November 15, 2015.[1] The jury returned guilty verdicts on the counts for the attempted murder of Jujuain Hemingway, armed robbery and the weapons charge. R. pp. 631-636. The jury did not reach a verdict on the murder charge and the court declared a mistrial as to that count. R. p. 639. The trial court sentenced Petitioner to the maximum sentence on each conviction for a total of sixty-five (65) years of consecutive time. Petitioner filed post-trial motions, which were denied by Order dated March 17, 2015. R. p. 5-8.

The Notice of Appeal was filed on March 23, 2015. On Appeal, Petitioner argued that the trial court erred in (1) admitting the eyewitness identification testimony of the victim, JuJuain Hemingway; and (2) permitting the jury to hear evidence that Heyward physically abused the co-operating co-defendant, Quasantrina Rivers.[2] The matter was briefed and argued before the Court of Appeals on November 16, 2017. A decision was issued on February 14, 2018. App. pp. 67-74. On March 16, 2018, Petitioner filed a Petition for Rehearing. App. pp. 75-87. The Petition for Rehearing was denied by order dated April 26, 2018. App. p. 88.

The Petitioner, Denzel M. Heyward, petitions the court for a Writ of Certiorari to the Court of Appeals Opinion No. 5537 (filed February 14, 2018), pursuant to Rule 242(a), SCACR.

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[1] No proceedings were held on November 11th, 2014, in observance of Veteran's Day.

[2] Petitioner also appealed the trial judge's decision to commence sentencing at 1:30 a.m., but has not raised that issue here.

STATEMENT OF THE FACTS

On May 16, 2012, Brothers Kadeem Chambers and Jujuain Hemingway drove from Longs, South Carolina, to 3475 Cynthia Drive, on John's Island near Charleston. Shortly after they arrived at 11:30 p.m., there was an altercation with two black males and one black female on the street in front of the residence. According to Hemingway's testimony, Chambers and Hemingway were ordered down on the ground. During the altercation, a subject wearing a red shirt, later identified as the Petitioner, kicked Hemingway in the head multiple times. The other subject fired a semi-automatic rifle at the ground near Hemingway's head. The female attempted to open the trunk of Chambers' car, before Hemingway was instructed to open the trunk of the car himself and get back on the ground. Shortly thereafter, Chambers and the subject holding the weapon "tussled" over the gun and two shots were fired. R. pp. 414-416, 526-527. Chambers was hit with two bullets. Hemingway fled into a nearby construction site, disposing of marijuana on the way. R. pp. 418-419. The two black males and the black female left in a dark colored sedan driven by the female.

Charleston County Sherriff's Officers responding to 911 reports of shots fired found Chambers behind the wheel of his Mercedes Benz, which he'd crashed into a white truck near the corner of Cynthia Drive. R. pp. 173-174, 176-177. He was taken to the Medical University of South Carolina, where he passed a few hours later.[3] Officers found Hemingway in a porta-potty at a nearby construction site on Constantine Thorpe Avenue.

The following day, May 17th, investigators interviewed Hemingway at his mother's home in Longs, South Carolina. Hemingway told investigators that he could identify one of the participants who was wearing a red shirt. R. p. 663. On the 18th, the officers returned with a

[3] Chambers still had $648.27 in his pocket at the time. R. p. 391.

"six-pack" line-up containing a photograph of the Heyward. During the interview, Hemingway's brother indicated to Hemingway that a person named "Fat" was involved in the crime. R. pp. 42, 49, 50, 57, 94-95. Hemingway failed to make an identification. The next day, officers returned to Longs and took Hemingway to the local police precinct, where they showed him another six-pack line-up containing a photograph of Heyward. In the second line-up on May 19th, Hemingway identified Heyward. However, he failed to identify either of the Co-Defendants, Deshaun Simmons or Quasantrina Rivers. R. p. 66.

On May 18th, Quasantrina Rivers disclosed her involvement to family members who then contacted police. Rivers subsequently turned herself in and was charged with accessory to murder, accessory to attempted murder and accessory to robbery. R. pp. 229-234. She provided two statements to investigators on May 19, 2012. On July 12, 2012, Rivers entered a proffer agreement with the state, and subsequently gave a greatly revised account of the events on July 17, 2012. R. pp. 317-319; R. pp. 320-321; and R. p. 330. Rivers was able to get out of jail as a result of signing the proffer and providing the revised statement. R. p. 331.

At trial, Rivers and her mother testified Heyward had a history of domestic violence against her. Rivers testified that on the day in question Heyward had forced her to drive Heyward and Simmons to Ridgeville, South Carolina, to pick up a gun from an accomplice named "Skrill." Afterwards, the three proceeded to Cynthia Drive, where Rivers participated in the alleged armed robbery before driving them back to Skrill's house after the incident occurred. Rivers was unable to lead investigators to Skrill's house, when accompanied by investigators.

ARGUMENT

I. The Court of Appeals did not address Petitioner's argument that the trial court failed to conduct the mandatory analysis required by Neil v. Biggers, which was an abuse of discretion by the trial court pursuant to State v. Moore.

1. The Court of Appeals did not address whether the trial court exercised its discretion by failing to conduct a Biggers analysis.

The Court of Appeals overlooked Petitioner's principal argument that the trial court failed to conduct any analysis of the reliability factors and evidence bearing on those factors presented during the pre-trial Biggers hearing, which was an abuse of discretion. State v. Moore, 334 S.C. 411, 415, 513 S.E.2d 626, (Ct. App. 1999), (finding failure to conduct Biggers factor analysis to be an abuse of discretion) *affirmed in part, reversed in part on other grounds*, 343 S.C. 282, 288, 540 S.E.2d 445 (2000).

Prior to the trial of this case, the Petitioner moved to suppress the out-of-court and in-court identification of Petitioner by Jujuain Hemingway pursuant to Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). To ensure due process, Neil v. Biggers requires courts to assess, on a case-by-case basis, the following: (1) whether the identification resulted from unnecessary and unduly suggestive police procedures, and if so, (2) whether the out-of court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012). "Under the totality of the circumstances, the factors to be considered is assessing the reliability of an otherwise unduly suggestive identification procedure are: (1) the witness's opportunity to review the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. Id.

During the *in camera* hearing, the testimony indicated that (1) the incident occurred at 11:30 p.m. on a stormy night; (2) Hemingway had smoked hallucinogenic drugs a short time before the initial contact with his assailants; (R. p. 102); (3) the witness was face down on the ground for the majority of the interaction (R. pp. 86-87); (4) the witness claimed that he had an equally good look at *both* of the assailants (App. p. 74; R. p. 85), but was never able to identify the co-defendants, *see,* State v. Moore, 540 S.E.2d 445, 343 S.C. 282, 249 (2000) (noting concern that witness was unable to identify co-defendant at time of confrontation despite claim that witness had seen the co-defendant's face); (5) Hemingway initially demonstrated no ability to make an identification, despite expressing a willingness to do so.

Hemingway failed to identify the Petitioner during the first photo line-up conducted at his mother's house on May 18th. During that interview, Hemingway's brother indicated to Hemingway that a person named "Fat" was involved in the crime. R. pp. 42, 49, 50, 57, 94-95. The following day, he was taken to the local precinct and shown another line-up. Hemingway testified that when the police picked him up, he feared they were going to lock him up for not making an identification. R. p 94. During the second photo line-up conducted at the police station, Hemingway identified the Petitioner, circled his picture and wrote, "I know him as fatt" on the identification form. R. pp. 671-677. Petitioner was the only person that appeared in both line-ups. Hemingway never identified the other co-defendants, who were only presented in a single line-up, rather than successive, suggestive line-ups. Hemingway also testified about the effect of seeing the Petitioner in both line-ups:

> Q. So they came in, they said, hey, we want to take you and have you look at another lineup?
> A. Yes.
> Q. Did you find it odd that they would have the same person in the lineup that you recognized from the 18th and now he's in the lineup on the 19th?
> A. Yeah.

Q. You did find that odd?
A. They had to know something that I didn't know. They had to know something that I didn't. They keep showing me the same picture.
Q. I'm sorry, could you say that again?
A. They had to know something that I didn't know. They kept showing me the same picture.
Q. They had to know something you didn't know if they were showing you the same picture?
A. Yes.

R. pp. 115-116.

During status conferences between counsel for the Defendants and the state, photographic line-ups of the Petitioner were discussed. On the Friday preceding trial (and the Biggers Hearing) the solicitor's office disclosed for the first time that Hemingway could have identified the Petitioner in the initial line-up but declined to do so.[4] Hemingway never told Charleston County Sherriff's personnel that he could have identified the Petitioner during the first line-up, nor did the solicitor disclose this fact to defense counsel until the Friday evening before trial. Defense counsel brought this delayed disclosure to the attention of the trial court before the hearing. There was a thorough on the record discussion of the failure to disclose. R. pp. 18-34.

The trial court made the following finding after the Biggers hearing:

"Well, I find that the lineup was unduly suggestive because they showed up with a lineup with the Defendant in it, and then 24 hours later showed up with a different lineup but there was one picture that was the same and that was the Defendant. And as the one witness said, well, that suggested to me they knew something. And then I think it taints that lineup and makes it unduly suggestive; however, that's just the first prong of the analysis.

The second prong is, even though it was unduly suggestive, it was nevertheless reliable. And considering Mr. Jujuain Hemingway's testimony that he, in fact, was able to identify Mr. Heyward on the first day, but just chose to just not verbalize that because he was angry *suggests to me that he was not, in fact, influenced by the second lineup.* He stated, yeah, that suggested to me that they knew something that I didn't know, but at the same time he states that he had already made the identification. So the second one didn't influence his first – it couldn't have influenced his first lineup, so – or his first identification.

[4] Despite a thousand page production, the claim that Hemingway lied to investigators during the first line-up appeared for the first time in a footnote to the State's Pretrial Brief. R. p. 20.

> So even though the lineup procedure combined – combining the two was unduly suggestive, *I don't think it was unreliable because of the unique – very unique circumstances of Mr. Hemingway stating that he had, in fact, already identified it, but because of his anger and his youth had decided not to share that identification with police.*
>
> All right. So your motion to suppress that will be denied." (emphasis added)

R. pp. 193-195. The trial court did not address any of evidentiary facts bearing on the Biggers factors. Nor did the trial court consider the evidence discussed by the State in its brief or discussed by the Court of Appeals to support a finding of reliability. *See*, App. p. 45; App. p. 70. This was error.

By failing to consider the factors set forth in Biggers the trial court abused its discretion. In State v. Moore, 334 S.C. 411, 415, 513 S.E.2d 626 (Ct. App. 1999) the Court of Appeals held a trial court's failure to conduct a review of the reliability factors set forth in Biggers is an abuse of discretion. This court affirmed holding in Moore. *See* State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000). Even the Respondent agreed that these objective factors bearing on a witnesses perception are a mandatory part of the trial court's analysis writing, "[C]ourts *must* evaluate the totality of the circumstances using the [Biggers] factors . . ." App. p. 44 (emphasis added). It is indisputable that the trial court never passed on the evidence bearing on the objective factors set forth in Biggers relating to the reliability of Hemingway's perception before making a final ruling. Instead, the trial court only made a determination based on the credibility of the witness's statement that he had lied during the first line-up – a fact that was not disclosed to law enforcement for years after the line-ups occurred.

The Court of Appeals avoided answering whether or not the trial court had an obligation to make regular findings in accordance with state and federal constitutional law. Although the

Court of Appeals understood Petitioner's argument,[5] it did not address whether the trial court engaged in the analysis. Instead of addressing whether the trial court exercised its discretion, this Court of Appeals engaged in its own fact-finding. I doing so, this Court did not consider the totality of the circumstances, but rather applied a deferential standard that only considered the sufficiency of the record to support findings that were never made at the trial court below. (See discussion below.)

Because the trial court did not evaluate the reliability of Hemingway's identification in light of the Biggers factors, the identification evidence should not have been admitted. *See,* State v. Moore, 334 S.C. 411, 415, 513 S.E.2d 626.

2. Making a reliability determination based on the credibility of an after-the-fact explanation subverts the purpose of the Biggers factors, which is to assess the objective ability of a witness to view the Defendant, before any suggestive procedures plant the possibility of irreparable misidentification.

Instead of considering the Biggers factors, the trial court only made a determination based on the credibility of the witness's very belated disclosure that he had lied during the initial line-up. This determination is in direct conflict with Biggers, which created objective factors that assess what a witness could have seen and the reliability of their perception before any suggestive procedures occurred. As the Fourth Circuit wrote:

> "Positive identification testimony is the most dangerous evidence known to the law. That is true because it is easier to deceive ourselves than others: pressured to help solve a heinous crime, often conscious of a duty to do so, and eager to be of assistance, a potential witness may be readily receptive to subtle, even circumstantial, insinuation that the person viewed is the culprit. Unless such a witness is far more introspective than most, and something of a natural-born psychologist, he is usually totally unaware of all of the influences that result in his say, "That is the man."

[5] "On appeal, Heyward argues the trial court erred in (1) failing to consider the Neil v. Biggers reliability factors after finding the photo lineup was unduly suggestive." App. p. 71.

United States v. Greene, 704 F.3d 298, 306 (4th Cir. 2013), *quoting* Smith v. Paderick, 519 F.2d 70, 75, n. 6 (4th Cir. 1975). Because suggestive identification procedures, by their very nature tend to create a false belief in the mind of the witness, the witness's beliefs and certainty in those beliefs are not part of the objective analysis. That is why the Biggers directs the court to assess the "level of certainty *demonstrated at the time of the confrontation.*" In this case, the witness outwardly demonstrated *no certainty* at the time of the initial confrontation. Then, the next day, after being taken into a police station where he feared for his liberty, and shown a highly-suggestive follow-up line-up, the witness demonstrated absolute certainty and even identified the Petitioner by the nickname given to him by his brother the day before. To refuse to consider the objective evidence for an after the fact explanation subverts the purpose of entire Biggers analysis, because it replaces the objective review of the totality of the circumstances with a subjective credibility test that has no place in the reliability determination.

3. The Court of Appeals exceeded the scope of review and erred by engaging in fact-finding where the conflicting evidence did not admit but one inference. Because of conflicting testimony, the issue of reliability should have been remanded to the trial court.

As noted above, the Court of Appeals proceeded to engage in constitutional fact-finding without addressing whether or not the trial court had undertaken the necessary Biggers analysis. In conducting its own *de novo* review of the evidence, the Court of Appeals only considered evidence supporting admission of the evidence, rather than considering the totality of the circumstances. Although it should have been reviewing whether the lower court failed to exercise its discretion, the Court of Appeals launched into assigning credibility and weight to evidence on a number of factual matters (App. p. 71), which the trial never addressed. Because the Court of Appeals disregarded its review of questions of law and improperly engaged in weighing evidence, it abused its scope of review.

Because there was conflicting testimony on many of the Biggers factors, the Court of Appeals should not have undertaken its own analysis of the factors. Whether an eyewitness identification is sufficiently reliable is a mixed question of law and fact. State v. Moore, 334 S.C. at 418, 513 S.E.2d at 629. Only in those cases where the evidence supports but one reasonable inference, does a mixed question of law and fact become a matter of law for the court. State v. Moore, 343 S.C. at 288, 540 S.E.2d at __. In this case, the objective evidence does not admit of just one possible inference. As discussed above, the evidence bearing on the witness's perception and recollection cut both ways on many of the Biggers factors. As a result, the Court of Appeals exceeded the scope of review by conducting its own analysis. *See*, State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, __, (2001) (holding the Court of Appeals erred in taking a *de novo* approach to admissibility of evidence).

Even if the court could review the findings *de novo*, it would be required to apply the same totality of the circumstances standard that the trial court failed to apply. However, in conducting its analysis, the Court of Appeals failed to discuss or consider the totality of the circumstances surrounding the identification, and instead searched the record only for evidence that would support findings that were *never made by the trial court.* In doing so, the Court overlooked many of the most important facts on this issue, including the highly suggestive and coercive actions of law enforcement; the time of day; the intoxication of the witness, the position of the witness on the ground; and the witness's inconsistency in his ability to identify other participants.

The decision of the Court of Appeals expands the power of appellate courts to evaluate qualities of the evidence that should be made by the trial court in the first instance. Accordingly,

the decision of the Court of Appeals should be vacated and the issue of reliability should be remanded to the trial court for findings consistent with Biggers.

4. The Court of Appeals misapplied this court's decision in State v. Liverman in a way that reduces the procedural safeguards afforded defendants.

Finally, Petitioner submits that the Court of Appeals has misapprehended or misstated the rule in State v. Liverman, 398 S.C. at 143-44, 727 S.E.2d at 428-429, in finding the admission of the identification evidence to be harmless. The opinion states that the ability to vet identification evidence at trial will always cure the erroneous admission of identification evidence that would otherwise violate a defendant's due process rights. App. p. 71. The Court of Appeals suggests that Liverman holds that "any error in the admission of identification evidence to be harmless where the reliability of the identification evidence was fully vetted at trial, the weaknesses in the evidence were exposed on cross-examination, and defense counsel reminded the jury of those weaknesses during closing arguments." Id.

Of course, such a broad reading of Liverman would make pre-trial misidentification safeguards a meaningless exercise. That was not what this court intended.

In Liverman, the court concluded that the error of not having a full *in camera* hearing was harmless, because the identification was nevertheless reliable, largely based on the witness's prior knowledge of the defendant. 398 S.C. 141, 727 S.E.2d 427. Only in "reinforcing" this primary conclusion, did the court state that the vetting of evidence at trial provided *additional* support for their conclusion. Liverman, 398 S.C. 142-144, 398 S.E.2d at 143-144. In short, cross-examination and trial rights are *not* a standalone cure for improperly admitted identification evidence under Liverman. The Court of Appeals's statement of the law on this point is a dangerous erosion of defendants' due process rights and may undermine fair proceedings in the future.

The prejudice to the Petitioner was significant and the error was not harmless. The harmless error doctrine should be used guardedly and on a case-by-case basis. State v. Morris, 289 S.C. 294, 297, 345 S.E.2d 477, 479. No definite rule of law governs finding an error 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, 454-55, 602 S.E.2d 62, 73 (Ct.App.2004) (citing State v. Reeves, 301 S.C. 191, 391 S.E.2d 241 (1990)). Whether an error is harmless depends on the particular facts of each case. Two factors bearing on the harm of an error are (1) the importance of the witness's testimony in the prosecution's case and (2) the overall strength of the prosecution's case. State v. Mizzell, 349 S.C. 326, 333, 563 S.E.2d 315, 318-19 (2002) (quoting Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S.Ct. 1431, 1438 (1986)). As noted above, positive identification evidence is extremely dangerous, and a jury is likely to accept it uncritically. United States v. Greene, 704 F.3d 298, 306 (4th Cir. 2013), *quoting* Smith v. Paderick, 519 F.2d 70, 75 (4th Cir. 1975).

As is set forth more fully in Petitioner's Initial Brief and Reply Brief (App. pp. 14-17, pp. 60-62), the state repeatedly used the identification evidence in multiple contexts to bolster its case, which rested exclusively on the testimony of Jujuain Hemingway and one other witness. The solicitor presented the identification as *two affirmative identifications*. R. pp. 415-441. Additionally, the state introduced recorded telephone calls of the co-defendant stating that Hemingway's identification underscored Petitioner's guilt.[6] The solicitor repeatedly came back to the identifications in her closing arguments (R. 615, 617, 619-20) and the jury repeatedly requested copies of the telephone conversations and the solicitor's arguments.

[6] "That's why you really need to be keeping up with this case. Dog ain't going nowhere. Too much shit points towards him. He's saying he ain't even been there and the victim picked him out of a lineup, the victim. The victim, the victim. . . . everything points towards him . . .." Transcript of Dashaun Simmons Telephone Call, R. p. 615.

II. The trial court erred in allowing evidence that the Petitioner abused the cooperating co-defendant, Quasantrina Rivers, because defense counsel did not "open the door" to the subject matter. Additionally, the issue was preserved because the basis of Petitioner's objections were obvious from the context in accordance with Rule 103, SCRE.

Before trial, the Petitioner moved to exclude any testimony about allegations of domestic violence by the Petitioner against Quasantrina Rivers ("Rivers"), an alleged co-conspirator and prosecution witness. Petitioner moved to exclude her testimony on the bases of relevancy and undue prejudice. R. 138. Petitioner specifically remarked on the number of female jurors and the likelihood that testimony would unfairly paint the Petitioner in "an ugly light." Id. The state sought to introduce numerous incidents of domestic violence, including video of the Petitioner hitting Rivers months before May 16, 2012. The state argued the violent incidents during the course of the relationship showed the violent nature of the relationship, and specifically the Petitioner's violent temperament toward Rivers. R. pp. 138-151. They further argued that the incidents showed that Petitioner used violence to bend Rivers to his will. The solicitor specifically told the judge she wanted the jury to "understand that when she does not conform to what he wants, he smacks her." R. p. 146. The court properly rejected these persistent arguments, noting the state's efforts to depict Petitioner as a violent abuser, directly contravened the purpose of Rule 404(b), which is to exclude character evidence offered to prove a character trait of the defendant consistent with the crime charged.[7] The court did not totally foreclose the possibility that the state *might* be able to introduce the domestic violence incidents if it was

[7] "[Y]our trying to say he's a really bad guy and, therefore, he's convicted -- he should be convicted of this, look at all these other things that he did. And that's exactly what character evidence is usually not allowed to do." R. p. 144.

necessary to rehabilitate Rivers following the defense's cross-examination of Rivers or if it was relevant to the night in question. R. pp. 150-151.

Before Rivers ever testified, her mother, Sidearis Singleton took the stand. During her cross-examination, Defense Counsel inquired whether Singleton knew if Rivers had accused Singleton's husband of sexual assault:

Q. Do you know if [Rivers has] had some mental health issues?
A. I am unsure about that.
Q. Do you know whether she's accused anyone in your family of sexually assaulting her?
A. I'm not sure about that, sir.
. . .
Q. Do you have a husband at the present time?
A. Yes, sir.
Q. And what is his name?
A. His name is Phillip.
Q. Do you know whether [Rivers] has ever accused Phillip of sexually assaulting her?
A. No sir.
Q. You do not know whether that's true or not?
A. No sir.
Q. You're still presently married to Phillip?
A. Yes, sir.
Q. All right. And if [Rivers] had accused him of sexually molesting her, then you would not be married to him if you believed those were correct; is that true?
A. Correct.
Q. You're uncertain whether [Rivers] has ever accused Phillip of sexually assaulting her?

R. pp. 239-240. The obvious intent of defense counsel was to elicit testimony regarding a specific instance of fabrication by Rivers. The only suggestion made was that Rivers' mother did not believe the specific allegation of sexual assault made against her husband.

On redirect, the State then proceeded to ask Ms. Singleton "Who did you know that abused [Rivers]." R. p. 248. Defense counsel immediately objected. The court immediately

stated that Petitioner's counsel had "raised the issue." R. 248. Subsequently, the solicitor was permitted to ask the following line of questions:

> Q: Who are you aware of that harmed Trina?
> A. In what way?
> Q: In any way. In a physical way?
> A: In a physical way, that I know of, is domestic violence.
> Q: And who was that on the part of? Who harmed her?
> A. Her baby's father.
> Q: That man? Fat? Denzel?
> A: Yes, ma'am.
> Q: And it wasn't just on the night in question, was it?
> A: No, ma'am.
> Q: There had been a history of that?
> A: Yes, ma'am.
> Q: Had you ever seen her after he hurt her?
> A: Yes, ma'am.
> Q: Did you ever see any physical signs of it yourself?
> A: Yes, ma'am.
> Q: What did you see?
> A: Her hair was taken out of here, the side. She had some braids but the hair was gone. And her lip was busted or swelled up.

R. pp. 248-249. At this point Petitioner's counsel objected again, this time on the additional grounds that the witness did not have first-hand knowledge of how the injuries occurred. This objection was also overruled. R. p. 249. The solicitor was allowed to continue:

> Q: Ms. Singleton, other than the time when he ripper her hair and busted her mouth, were you aware of other occasions that he had behaved in a similar fashion towards her?
> A. Yes, ma'am.
> Q: And how did that affect your level of comfort with her having a relationship with him?
> A: I did not have a relationship with him, really.
> Q: Were you happy that she did?
> A: I wasn't happy.
> Q: And, again, that happened on more than just one occasion; is that correct?
> A: Yes, ma'am.
> Q: And you are aware of whether it happened in other cities other than in Charleston?
> Q: Yes, ma'am.
> Q: So other cities and other times?
> A: Yes ma'am.

R. pp. 249-250.

1. The Court of Appeals erred in affirming the trial court's ruling that Petitioner's counsel opened the door. Nothing in the record or the opinion supports upholding the trial court's decision, because the character evidence did not explain or rebut anything presented in the Petitioner's cross-examination.

The Court of Appeals declined to address the Petitioner's argument related to the impermissible character evidence, and did not provide any support for its conclusion that defense counsel opened the door to the testimony of Sidearis Singleton. The Court of Appeals provided one conclusory statement writing, "[W]e find defense counsel opened the door to the *issue of abuse* during the cross-examination of Singleton." App. p. 73. However, neither the Court of Appeals, nor the State, has offered any explanation for how Singleton's testimony explained, rebutted or even related to the subject matter of defense counsel's questioning. As a result, the state succeeded in its "thinly-veiled" effort to skirt the fundamental safeguards provided by Rule 404(b), SCRE.

To "open the door" a party has to invite the disputed evidence by raising a fact or creating an inference that, out of fairness, calls for a response from the other party. "Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though [the] latter evidence would be incompetent or irrelevant had it been offered initially." State v. Young, 364 S.C. 476, 613 S.E.2d 386 (2005); quoting State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984) (alterations in original) (citing State v. Albert, 303 N.C. 173, 277 S.E.2d 439, 441 (1981)). However, there must be a logical, subject-matter nexus between the door opening evidence and the inferences created therefrom, and the "rebuttal" or "explanation" that enters because of the newly opened door. Evidence that does not explain or rebut what the defendant put forward is not properly admitted under the doctrine of "opening the door." *See,* State v. Foster, 354 S.C. 614, 623, 582

S.E.2d 426, 431, (2003). Furthermore, this court has reversed the Court of Appeals for employing the "opened door" doctrine to permit a "thinly-veiled attempt to show propensity" rather than a sincere attempt at addressing credibility. *See*, State v. Young, 378 S.C. 101, 106, 661 S.E.2d 387, 390 (2008).

Petitioner's main argument on this issue was that there was no logical basis or subject matter relationship between defense counsel's questions and the evidence introduced by Sidearis Singleton. App. p. 20-23. Singleton's testimony related to domestic violence by Heyward did not, in any way, explain, rebut or illuminate any suggestion or inference about Quasantrina River's totally unrelated allegations of sexual assault against her step-father. *See* State v. Foster, 354 S.C. 614, 623, 582 S.E.2d 426, 431, (2003) (rejecting argument that evidence which did not rebut or explain defense counsel's cross-examination questions was properly admitted through the open door doctrine). Based on the record from the Lyle hearing indicating the State's reasons for offering this testimony, it is clear that this was an abuse of the open door doctrine or "a thinly-veiled attempt to show propensity." State v. Young: 378 S.C. 101, 106, 661 S.E.2d 387, 390 (2008).

Evidently, the Court of Appeals could not bridge logical gap in its opinion either. The Court of Appeals's conclusory statement that the Petitioner "opened the door to the issue of abuse," does not meet the requirements of Rule 220(b), SCACR, which requires that the reasons for the court's decision must be stated in writing. By failing to offer even a hint of justification for its decision, the Court of Appeals reduces the doctrine to a mere word game, where a defendant can stumble into treacherous grounds based on tangential associations of completely unrelated subjects.

Comparing the opinion to the authorities cited therein emphasized the logical disconnect. In each of the cases cited by the Court of Appeals, the decision explains *why* or *how* the "door was opened" to a particular piece of evidence. In each, there is a specific transaction or subject matter nexus between the evidence or questions which opened a "door." In State v. Robertson, 305 S.C. 469, 409 S.E.2d 404, the South Carolina Supreme Court explained that a defendant could not complain of evidence linking a group to drug dealing, when the defendant's own attorney had previously solicited evidence of the same group's involvement in drug dealing. In State v. Beam, 336 S.C. 45, 518 S.E.2d 297 (Ct. App. 1999), defense counsel questioned a state's expert about a certain type of test that had not been performed on some evidence, then complained of prejudice when *the same test* was performed during the trial and the results were admitted as evidence against the defendant. In State v. Page, 378 S.C. 476, 663 S.E.2d 357 (Ct. App. 2008), this Court went to extensive lengths to explain how the cross-examination by defense counsel created specific inferences about the state's investigation, but ultimately found that the questioning did not justify the admission of excluded evidence to rehabilitate an investigator. No such explanation is offered in this case.

2. The Petitioner's Objection to the Domestic violence Testimony was obvious from the Context of the entire proceedings under Rule 103, SCRE.

The Court of Appeals erred in ruling that Petitioner's objection to testimony about domestic violence against Qusantrina Rivers were not preserved because the objections were "not specific." App. p. 73. However, specific grounds for an objection are only necessary where the grounds are not clear from the context. Rule 103(a)(1), SCRE. Petitioner's arguments were clearly articulated and presented to the court in a pre-trial motion and the basis of Petitioner's contemporaneous, renewed objection was clear from the context. Prior to trial, defense counsel moved to exclude any testimony regarding alleged domestic violence between Petitioner and his

co-defendant Quasantrina Rivers. An extensive pre-trial Lyle hearing took place based on counsel's Rule 404(b) and 403 arguments. Defense counsel argued undue prejudice and relevance in the motion. At the conclusion of the pre-trial hearing, the trial court expressly ruled that the evidence the solicitor sought to introduce was directly excluded under Rule 404(b). The trial judge summarized the hearing as follows:

> "[Y]our trying to say he's a really bad guy and, therefore, he's convicted – he should be convicted of this, look at all these other things that he did. And that's exactly what character evidence is usually not allowed to do."

When the solicitor sought to introduce the exact same evidence through Sidearis Singleton at trial, the basis for defense counsel's objection was immediately apparent from the context. Despite its prior ruling to exclude testimony related to alleged domestic violence, the court permitted Mrs. Singleton to testify extensively regarding the abusive relationship between Petitioner and Rivers, without conducted any Rule 403 analysis. R. pp. 248-250.

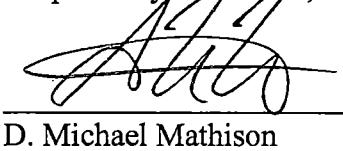
The prejudice from Singleton's testimony was substantial. Having a second witness shoe-horning forbidden propensity evidence to tarnish the Petitioner and bolster Rivers's credibility could have had a major impact on the outcome of the case. As the Supreme Court has explained: "[e]rroneously admitted corroboration testimony is not harmless merely because it is cumulative. On the contrary, `it is precisely this cumulative effect which enhances the devastating impact of improper corroboration.'" State v. Saltz, 346 S.C. 114, 124, 551 S.E.2d 240, 246 (2001). Contrary to the suggestion of the Court of Appeals, Singleton's testimony was not the same evidence offered by Rivers herself. As a co-operating co-defendant, Rivers testimony by itself was "presumptively unreliable" as matter of law. *See,* Lee v. Illinois, 476 U.S. 530, 541 (1986) (noting accomplice confessions are "presumptively unreliable"), *see also,* Bruton v. U.S., 391 U.S. 123, 136 (1968) (noting that juries are instructed to weigh evidence

from a co-defendant in light of motivation to shift blame.) Rivers testimony was critical to the state's case in chief. She was the exclusive, unverified source of much of the State's case, and the primary witness quoted by the Court of Appeals in its decision. Where the credibility of a witness is of paramount importance to a claim or a defense, an error bearing on that witness's credibility is not harmless. *See* State v. Morris, 289 S.C. at 298, 345 S.E.2d at 479. Accordingly, the error was neither harmless nor excusable under the cumulative evidence theory.

CONCLUSION

Because these issues require the Court's attention and affect significant rights of the Petitioner and others, the Petitioner requests that the court grant this petition and permit further review of this case.

Respectfully Submitted,



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June 8, 2018

Columbia, South Carolina.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

Roger M. Young, Circuit Court Judge

Case Nos. 2014-GS-10-00763
2014-GS-10-00765 and 2014-GS-10-00767

Appellate Case No. 2018-000981

The State, ... Respondent,

v.

Denzel Heyward ..... Appellant.

PROOF OF SERVICE

I certify that, on June 8, 2018, I served the Petition for Writ of Certiorari and Appendix on the attorneys for the Respondent, by delivering a copy of same to the offices of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Room 519, and leaving a copy with a person of suitable age and discretion, addressed as follows:

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May 29, 2018

The Honorable Daniel E. Shearouse
Clerk of Court for the South Carolina
Supreme Court
1231 Gervais St.
Columbia, SC 29201
(803) 734-1499

Re: The State of South Carolina v. Denzel Marquise Heyward
Appellate Case No. 2018-000981; Court of Appeals Opinion No. 5537

Dear Mr. Shearhouse,

Enclosed for filing in the matter referenced, please find the original and six copies of the Petition for Writ of Certiorari and two copies of the Appendix and Record on Appeal. Also enclosed is the original Proof of Service on opposing counsel.

By copy of this letter I am filing a copy of the Petition with the Court of Appeals.

Sincerely,

D. Michael Mathison

Cc: ✓ The Honorable V. Claire Allen,
Clerk of the S.C. Ct. of Appeals
J. Clayton Mitchell, III, Esq.
Alan M. Wilson, Esq.
Robert M. Dudek, Esq.
Mr. Denzel M. Heyward