THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of General Sessions

Robert E. Hood, Circuit Court Judge

Case No. 2017-001476

The State of South Carolina.....Respondent,

v.

Brandon Lee Cox .....Appellant.

INITIAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

I. The Trial Court Wrongfully Refused to Charge a Lesser-Included Offense.

While the State is correct that Cox's trial counsel requested a charge for the lesser-included offense of common-law ABHAN, the trial judge's statements fairly infer that he was not going to consider charging *any* lesser-included offence due to the need to prove sexual battery. (Tr. Trans. pp. 355-57). Thus, Cox's trial counsel did not need to specifically state the type of assault and battery to preserve this error. See State v. Brannon, 388 S.C. 498, 697 S.E.2d 593 (2010) (A party need not use the exact name of a legal doctrine in order to preserve the issue for appellate review, but it must be clear the argument was presented on that ground.); State v. Higgenbottom, 344 S.C. 11, 542 S.E.2d 718 (2001) (Error preservation is not necessary when raising the issue would have been futile.). Further, "[o]ur supreme court has observed 'it may be good practice for us to reach the merits of an issue when error preservation is doubtful.'" State v. Williams, 417 S.C. 209, 229, 789 S.E.2d 582 (Ct. App. 2016) (quoting Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 330, 730 S.E.2d 282, 285 (2012)). "'[W]here the question of preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation.'" Id. (quoting Atl. Coast Builders at 333, 730 S.E.2d at 287 (Toal, C.J., concurring in part and dissenting in part)).

The State and the trial court appear to argue that assault and battery in the second degree does not meet the "elements test", and thus cannot be a lesser-included offense of First Degree CSC with a minor. While Cox disagrees with this argument, this state also entertains deviations from the "elements test", particularly in reference to sex crimes.

State v. Elliott, 346 S.C. 603, 607-8 552 S.E.2d 727, 729 (2001), *overruled on other grounds*, State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). South Carolina courts have recognized ABHAN as a lesser-included offense of CSC with a minor. See e.g. State v. Perez, 423 S.C. 491, 816 S.E.2d 550 (2018). If First Degree CSC with a minor truly has no lesser-included offence, then a person accused of such an offense (and a jury weighing his fate) faces a sentence of twenty-five years (or life imprisonment, or death) or nothing. This is unjust, and this Court should recognize that Second Degree Assault and Battery is a lesser-included offence of First Degree Sexual Assault with a Minor and remand this case for a new trial.

II. The State admits a violation of Rule 5, S.C.Crim.P., which is prejudicial.

The State admits that its withholding of the recording of Cox's jailhouse conversation with his father was a violation of Rule 5, S.C.Crim.P, and thus an error. (Resp. Init. Brief pp. 22-23). It attempts to minimize this error by claiming it was "immaterial" and "harmless".[1] However, the State directly referenced this conversation in its closing argument:

> Defense counsel mentioned that the defendant talked to his father on the phone and felt that just saying "I didn't do it" wasn't enough for his father, so he told him that had tattoos before he was arrested. The only reason the defendant got those tattoos was to try to fool you. They say that's ridiculous, "Why would he do that?"

(Trial Tr. p. 402). Cox's trial counsel was prevented from effectively addressing the jailhouse call during Cox's testimony, allowing the State to make the above argument almost unchallenged. This is prejudicial and mandates reversal.

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[1] Even if this error were "harmless", it nonetheless supports Cox's Cumulative Error argument (see section IV).

Further, the State correctly points out that discovery rulings are reviewed under an abuse of discretion standard. (Resp. Init. Brief. p. 22). The trial court's ruling on the withholding of the jailhouse conversation (Trial Tr. pp. 344-49) does not specifically state what remedy or "other order" it is issuing pursuant to Rule 5, S.C.Crim.P. "A failure to exercise discretion amounts to an abuse of that discretion." Samples v. Mitchell, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct.App. 1997). This abuse of discretion mandates the reversal of Cox's conviction.

III. The trial court's exclusion of evidence of witness intimidation by one of the State's witnesses violated the Confrontation Clause.

In excluding evidence of intimidation of witness Matthew Chapman, the trial court held as follows:

> At this point I am going to exclude testimony down that line of questioning about a conversation that occurred between Mr. Ingram and Matthew Chapman and/or Tammy Chapman. I don't find that to be relevant to the issues at hand. I also think under Rule 403 that it would be [confusing] to the jury as to what the true issues in this case are.

(Trial Tr. p. 278). It is implicit in this holding that no further witnesses can be called on this issue and Daniel Ingram could not be recalled, thus preserving this issue for review. See Higgenbottom, *supra.* (Error preservation is not necessary when raising the issue would have been futile.).

"A violation of the defendant's Sixth Amendment right to confront the witness is not *per se* reversible error" only if the "error was harmless beyond a reasonable doubt." State v. Graham, 314 S.C. 383, 386, 444 S.E.2d 525, 527 (1994). The phrase "harmless beyond a reasonable doubt" means there must be "no reasonable *possibility*" that the error contributed to the verdict. State v. Henderson, 286 S.C. 465, 472, 334 S.E.2d 519,

523 (Ct.App. 1985) (emphasis added); U.S. v. Hasting, 461 U.S. 499, 506 (1983). Proofing error harmless beyond a reasonable doubt is a "heavy burden." See e.g. Anderson v. Warden, 696 F.2d 296, 300 (4th Cir. 1982) (en banc) ("Harm is presumed to have come from the constitutional error, and the state has the 'heavy burden' of proving harmlessness beyond a reasonable doubt.").

Whether an error is harmless depends on the particular facts of each case, including:

> the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and of course the overall strength of the prosecution's case.

State v. Mizzell, 349 S.C. 326, 333, 563 S.E.2d 315, 318 (2002) (quoting Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986)). **However, these "Van Arsdall factors" are not exhaustive.** Graham, *supra.* An error that impairs a defense theory creates a reasonable possibility that the error contributed to the verdict. E.g. U.S. v. Brady, 561 F.2d 1319 (9th Cir. 1977) (Trial court's refusal to allow cross-examination on a prior source of narcotics undercut the defense theory that the victim was lying out of fear when she named the defendant as her supplier.); Stack v. U.S., 519 A.2d 147 (D.C. 1986) (Trial court's refusal to allow cross-examination on prior assault to decedent excluded evidence that "went to the heart of [the] defense theory" that someone else struck the fatal blow.); Baucham v. State, 881 So.2d 95 (Fla.Dist.Ct.App. 2004) (Trial court's refusal to allow cross-examination on defendant's prior complaints about police officers excluded evidence that was necessary to prove bias or motive for excessive force against defendant.).

Part of Cox's trial defense centered around Daniel Ingram's belief that Cox was having an affair with his wife. (Trial Tr. pp. 66, 237, 240, 330-31, 395). Cox's trial counsel specifically addressed this issue in his closing:

> But of all days, Tuesday May the 26th, Daniel Ingram decided to get a "gut feeling", got angry with his wife, possibly with Brandon, entered Brandon's password and checked his phone. I don't know why it happened that day. There's a lot of questions about what happened at the time and why he felt the need to do that, that day. He couldn't even explain it to you. He had an argument with his wife and -- there's some anger there, for whatever reason. I don't know what it was.
>
> But why did it happen that day? Of all times, why then was there a "gut feeling"? Of all times the day after Memorial Day when, by Daniel's testimony, they'd had a family trip to the waterfalls. I don't know. I don't have a clue. I don't know if you do or not.

(Trial Tr. p. 395). This argument was impaired by the trial court's refusal to allow evidence relating to Daniel Ingram's intimidation of Matthew Chapman (whether it be further examination of Chapman, cross-examination of Ingram, or the examination of Tammy Chapman (Matthew's mother). Thus, this error is not harmless beyond a reasonable doubt and reversal is mandated.

Even if the "Van Arsdall factors" are applied here, the exclusion of Ingram's intimidation of Chapman is not error beyond a reasonable doubt. Witness intimidation is an attack on the very structure of the trial process, and it was corroborated by Chapman's mother. The fact that no evidence of this intimidation was allowed at all means that it cannot be cumulative and no cross-examination the issue was allowed. Again, this error is not harmless beyond a reasonable doubt and reversal is mandated.

Further, Chapman's testimony regarding his intimidation by Ingram throws his credibility on that matter into question. Ingram was in the courtroom when Chapman testified, heightening the possibility of further intimidation. Further, the clear implication

of Ingram's conversation with Chapman (Trial Tr. pp. 262-71) was that he should incriminate Cox in order to prevent Chapman from being "throw[n]...under the bus". Even though Chapman testified he told the truth, his admitted intimidation by Ingram (Trial Tr. pp. 267-68) demands that the jury assess the credibility of that testimony:

> Even where the evidence is uncontradicted, the jury may believe all, some, or none of the testimony, and where the credibility of the witness has been questioned, the matter is properly left to the jury to decide:
>
> > The fact that evidence is not contradicted by direct evidence does not render it undisputed, as there still remains the question of its inherent probability and the credibility of the witnesses or his interest in the result. To justify a Court in instructing a jury that a witness has told the truth, and in directing a verdict based on the truthfulness of his evidence, there must be nothing in the circumstances or surroundings tending to impeach the witness or to throw discredit on his statements. If there is anything tending to create distrust in his truthfulness, the question must be left to the jury.

Ross v. Paddy, 340 S.C. 428, 434, 532 S.E.2d 612, 615 (Ct. App. 2000) (quoting Terwilliger v. Marion, 222 S.C. 185, 188, 72 S.E.2d 165, 166 (1952)) see also Okatie River v. Southeastern Site Prep, 353 S.C. 327, 338, 577 S.E.2d 468, 474 (Ct. App. 2003) ("Credibility determinations regarding testimony are a matter for the finder of fact, who has the opportunity to observe the witnesses..."). Again, the error of not allowing the jury to consider this evidence is not harmless beyond a reasonable doubt and reversal is mandated.

IV. The multiple errors of this trial demand application of the Cumulative Error Doctrine.

The State argues that Cox's assertion of the Cumulative Error Doctrine is not preserved for review. (Resp. Init. Brief pp. 29-30). In order to make a Cumulative Error

Doctrine at the trial level, trial counsel would need to take the position that each of the errors he has identified throughout trial were actually "insignificant". This is an unreasonable burden to place on trial counsel, and it runs counter to the South Carolina Supreme Court's growing skepticism of the harshness of error preservation rules. See Williams, *supra.*

During the trial of this matter, the trial court admitted wrongfully withheld damaging evidence without allowing Cox to rebut it (the jailhouse call), while excluding evidence of intimidation of one of Cox's witnesses (Matthew Chapman), and finally denied the jury an opportunity to exercise a measure of mercy via a lesser-included offense. While Cox is not entitled to a perfect trial, he is entitled to a structurally fair trial, and the combined effect of these errors has undermined the factfinding process and mandates reversal.

V. The State's Harmless Error analysis is misplaced.

As set forth in the previous arguments (particularly III), the errors in this action have impaired Cox's defense of the charges against him, and thus cannot be considered harmless.

CONCLUSION

For the arguments set forth above, Cox asks this Court to reverse Cox's convictions and remand this case back to the Court of General Sessions for a new trial.

Dated: 10/4/18

By: RJ mcl

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Reply Brief of Appellant in the above referenced case has been served upon William F. Schumacher, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Reply Brief of Appellant have been served on Brandon Lee Cox, #372972, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 4th day of October, 2018.

By: JMD

Jason Scott Luck
Garrett Law Offices, LLC

Robert M. Dudek
Chief Appellate Defender

ATTORNEYS FOR APPELLANT

SUBSCRIBED AND SWORN TO before me this 4th day of October, 2018.

Tawin Stevens (L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.