

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County

D. Craig Brown, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TYRONE WHATLEY,

APPELLANT

FINAL ANDERS BRIEF OF APPELLANT

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SC Court of Appeals

TABLE OF CONTENTS

TABLE OF CONTENTS.....1

TABLE OF AUTHORITIES.....2

STATEMENT OF ISSUE ON APPEAL3

STATEMENT OF THE CASE4

ARGUMENT5

CONCLUSION.....14

PETITION TO BE RELIEVED AS COUNSEL15

TABLE OF AUTHORITIES

Cases

Davis v. Alaska, 415 U.S. 308, 316 (1974) 7

Delaware v. Van Arsdall, 475 U.S. 673 (1986) 7, 9, 10

State v. Brown, 303 S.C. 169, 399 S.E.2d 593 (1991) 11

State v. Curry, 370 S.C. 674, 636 S.E.2d 649 (Ct. App. 2006) 11, 12

State v. Gillian, 360 S.C. 433, 602 S.E.2d 62 (Ct. App. 2004), aff'd as modified on other grounds, 373 S.C. 601, 646 S.E.2d 872 (2007) 7, 9

State v. Graham, 314 S.C. 383, 444 S.E.2d 525 (1994) 7, 8, 9, 10

State v. Mitchell, 286 S.C. 572, 336 S.E.2d 150 (1985) 8

State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002) 7, 9, 10, 11

State v. Sims, 348 S.C. 16, 558 S.E.2d 518 (2002) 8, 9, 11

Statutes

S.C. Code Ann. § 16-1-40 12

S.C. Code Ann. § 16-1-55 12

Rules

Rule 608(c), SCRE 7

Constitutional Provisions

U.S. Const. amend. V 10

U.S. Const. amend. VI 7, 8

STATEMENT OF ISSUE ON APPEAL

Did the trial court err in refusing to permit Appellant to question Ussery, an alleged co-conspirator, regarding the sentencing range for her pending charges where the state dismissed two counts of armed robbery after she cooperated with law enforcement?

STATEMENT OF THE CASE

A Florence County Grand Jury indicted Appellant on one count of burglary in the first degree, two counts of armed robbery, and one count of conspiracy. R. 253, Indictment. On August 4, 2010, the state served Appellant with its notice to seek life without parole based upon Appellant's prior conviction for armed robbery. R. 247 lines 4-8. On February 2, 2011, the state, represented by Fitzlee H. McEachin, called the case for trial before the Honorable D. Craig Brown and a jury. R. 5 lines 6-8. Scott P. Floyd represented Appellant. R. 1. The state presented testimony from the two victims, two co-defendants, and two police officers. The jury returned its verdict finding Appellant guilty on all counts. R. 245 lines 4-12. Judge Brown sentenced Appellant to life without parole on the burglary and armed robbery convictions and five years on the conspiracy conviction. R. 249 line 17 - R. 250 line 3. He ordered all sentences to run concurrently. R. 250 lines 4-5.

This appeal follows.

ARGUMENT

The trial court erred in refusing to permit Appellant to question Ussery, an alleged co-conspirator, regarding the sentencing range for her pending charges where the state dismissed two counts of armed robbery after she cooperated with law enforcement.

The state's theory of the case was that Appellant along with Jessica Ussery and John Barfield barged into the hotel room of Brandon Cross and Ciera Davis on July 21, 2009 and robbed them at gunpoint. R. 50 line 24 – R. 51 line 7. Police officers apprehended Ussery shortly after the robbery in a car containing items from the robbery. R. 96 line 21- R. 97 line 2; R. 98 lines 2-7. A police officer observed two individuals run from the vehicle, but was unable to apprehend or identify them. R. 94 lines 1-13. Shortly after her arrest, Ussery confessed to her role in the robbery. R. 125 lines 1-3. Although Ussery initially provided a false name for her co-conspirator and boyfriend to officers, she eventually named Barfield. R. 171 lines 13-20. Ussery knew the other individual only has Rom or Jamal Bryant. R. 116 lines 9-17. Almost a year after his arrest, Barfield provided officers with a nickname – Rom - for the third individual involved and the general location of Rom's residence. R. 173 lines 13-19. Officers learned that Appellant was a resident of the trailer in the location generally identified by Barfield. R. 173 line 24 – R. 174 line 1. Barfield then identified a photograph of Appellant as the third co-conspirator. R. 174 lines 1-10.

Ussery testified on behalf of the state. R. 109 lines 9-11. She identified Appellant as an individual involved in the robbery. R. 116 line 18 – R. 117 line 2. She was forced to admit that she had seen Appellant only a few times and did not know him. R. 131 lines 6-9. When pressed, she admitted she had seen Appellant “[m]aybe two or three times” and had no conversations with him. R. 131 lines 13-19. On cross examination, she testified she had

been charged with two counts of armed robbery, failure to stop for a blue light, and false information to police. R. 130 lines 2-4. She also admitted that the armed robbery charges had been dismissed, and she was charged with accessory before and after the fact. R. 130 lines 13-17. Appellant then questioned Ussery about the amount of time she could receive on the pending charges. R. 142 line 2. The state objected, R. 142 lines 3-5, and the judge sustained the objection, R. 142 line 6. There was no proffer and no argument by Appellant. Appellant then asked Ussery the possible sentence for her original charge of armed robbery. R. 142 lines 11-12. Ussery responded that she was not aware of the “full extent” but recognized it “carrie[d] a long sentence.” R. 142 lines 13-14.

The state also called Barfield to testify against Appellant. R. 143 lines 18-19. Barfield identified Appellant in court. R. 145 line 24 – R. 146 line 4. On cross examination, Barfield admitted that he had been charged with two counts of armed robbery, burglary in the first degree, weapon possession and criminal conspiracy. R. 158 lines 21-22. Barfield testified that he pled guilty to two counts of attempted armed robbery and received a seven-year sentence. R. 159 lines 3-10. All other charges against him were dismissed. R. 159 lines 11-13. When Appellant asked Barfield how much time he was facing on the original charges, the state objected. R. 159 lines 18-21. The trial court sustained the objection. R. 160 line 1. The court permitted Appellant to ask if Barfield could get substantially more time for armed robbery than for attempted armed robbery, R. 160 lines 6-11, and substantially more time for burglary in the first degree than for attempted armed robbery, R. 160 lines 12-14. After another witness testified for the state, the trial judge announced that he was changing his ruling. R. 184 line 10 – R. 185 line 5. He explained that his research revealed that Appellant could question Barfield concerning the amount of

time he was facing. R. 184 line 19-23. The judge ordered the state to recall Barfield and permitted Appellant to question him. R. 184 line 24 – R. 185 line 5. When Barfield testified for the second time, he admitted that he was facing ten years to thirty years on armed robbery charges and fifteen years to life on burglary charges. R. 190 line 18 – R. 191 line 5.

Although the trial judge recognized his error in ruling the questions concerning potential sentences impermissible as to Barfield and allowed re-questioning of him, the trial judge did not permit Appellant to re-question Ussery despite the same ruling having been made during cross-examination of her. This was error.

The Sixth Amendment to the United States Constitution guarantees an accused the right to be confronted with the witnesses against him. “The Confrontation Clause requires a witness to testify under oath and submit to cross-examination so that the jury can observe the witness’s demeanor and assess his credibility.” State v. Gillian, 360 S.C. 433, 602 S.E.2d 62 (Ct. App. 2004), aff’d as modified on other grounds, 373 S.C. 601, 646 S.E.2d 872 (2007). This guarantee ensures a defendant has the opportunity to cross-examine a witness concerning bias. Davis v. Alaska, 415 U.S. 308, 316 (1974); State v. Mizzell, 349 S.C. 326, 331, 563 S.E.2d 315, 317 (2002); State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994). Additionally, Rule 608(c) of the South Carolina Rules of Evidence states that “[b]ias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.” To establish a violation of the Confrontation Clause, Appellant must show that he was prohibited from asking questions designed to show bias on the part of Ussery. See Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986). In addition, the error must not

have been harmless beyond a reasonable doubt. State v. Mitchell, 286 S.C. 572, 574, 336 S.E.2d 150, 151 (1985), State v. Sims, 348 S.C. 16, 26, 558 S.E.2d 518, 523 (2002).

Appellant's question to Ussery concerning the length of sentence she could receive on her pending charges was an appropriate question. Numerous decisions of South Carolina's appellate courts hold that questions regarding sentences and potential sentencing are probative of witnesses' biases and prejudices. An exploration of several of those cases illustrates Appellant's question was appropriate and the trial court's ruling violated Appellant's rights. During Graham's murder trial, the presiding judge prohibited Graham from asking a witness called by Graham's co-defendant about an eight-year sentence he received for accessory after the fact of the murder for which Graham was on trial. Graham, 314 S.C. at 385-386, 444 S.E.2d at 527. With little elaboration, the South Carolina Supreme Court held this limitation violated Graham's Sixth Amendment rights. Id.

In Sims, 348 S.C. at 25-26, 558 S.E.2d at 523, the South Carolina Supreme Court held the trial judge erred when he limited the defendant's questioning of a state witness about pending charges. The Court was persuaded that the number of the charges pending "and the severity of the potential sentences" was probative as to the witness' bias. Id. at 25, 558 S.E.2d at 523 (explaining the witness was charged with burglary in the first degree, among other crimes, which exposed the witness to a possible life sentence). According to the Court, "[t]here was the substantial possibility [the witness] would give biased testimony in an effort to have the solicitor highlight to his future trial judge how he had cooperated in the instant case." Id.

In Mizzell, 349 S.C. at 330, 563 S.E.2d at 317, the South Carolina Supreme Court held the trial court erred in refusing to permit the defendant to question the witness on the

potential sentences he faced where the witness was charged with the same crimes as the defendant. The Court was not persuaded by the state's argument that the testimony was not probative because the witness had neither agreed to a plea bargain nor pled guilty and held this fact should not prevent the admission of such evidence. Id. at 332-333, 563 S.E.2d at 318. The Court held "[t]he lack of a negotiated plea, if anything, creates a situation where the witness is more likely to engage in biased testimony in order to obtain a future recommendation for leniency." Id. at 333, 563 S.E.2d at 318.

In the instant case, Ussery testified that although her charges had been changed or reduced, she had no negotiated plea or plea agreement with the state. The trial judge's refusal to permit Appellant to ask Ussery about potential sentencing on her pending charges was clear error because the question probed Ussery's bias, the primary tool of cross-examination. Just as the South Carolina Supreme Court held in Mizzell and Sims, the lack of a negotiated plea created a situation where Ussery was more likely to provide biased testimony to curry favor with the state.

The next inquiry is whether the error was harmless beyond a reasonable doubt. Gillian, 360 S.C. at 454, 602 S.E.2d at 73; Mizzell, 349 S.C. at 333, 563 S.E.2d at 318; Graham, 314 S.C. at 385, 444 S.E.2d at 527. Harmless error analysis is fact-specific. The United States Supreme Court delineated a list of factors for courts to consider in determining whether an error was harmless. These factors include, but are not limited to:

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.

Van Arsdall, 475 U.S. at 684; see also Mizell, 349 S.C. at 333, 563 S.E.2d at 318-19.

The South Carolina Supreme Court held a violation of the Confrontation Clause was not harmless even where the facts did not fall squarely within the Van Arsdall factors. Graham, 314 S.C. at 385, 444 S.E.2d at 527-528. The witness, Simmons, first invoked his Fifth Amendment right not to incriminate himself where there was still a pending murder indictment against him despite his guilty plea to accessory to murder after the fact. Id. at 386, 444 S.E.2d at 528. The prosecutor claimed the plea agreement was valid only if the state called Simmons and Simmons testified truthfully, which the state defined as consistent with a prior statement that he was drunk and had no knowledge of the surrounding events. Id. at 386-387, 444 S.E.2d at 528. The prosecutor acknowledged he could not prevent Simmons from testifying, but continued to threaten further prosecution unless Simmons testified truthfully, as defined by the prosecutor. Id. Predictably, Simmons testified he was drunk and had no knowledge of the murder. Id. Graham then proffered the testimony of another witness who stated that Simmons informed the witness that he would have no further problems with the victim and that Simmons had killed the victim. Id. The Court stated that the prosecutor's attempted manipulation of Simmons' testimony and the witness' proffered testimony raised the question of the extent of Simmons' involvement in the murder. Id. The Court held the jury was entitled to know Simmons' sentence of only eight years as murder was a serious crime for which Graham, who was sixteen, received a life sentence and Simmons avoided the heavy penalty "for what may have been his silence." Id.

In Mizzell, the Court held the trial court's error in limiting cross-examination of a witness concerning potential sentencing was not harmless because the witness provided the only evidence of the defendants' participation in the crime. 349 S.C. at 334, 563 S.E.2d at 319. Although some of the testimony from the witness was cumulative, the witness

provided the only evidence that the defendants were at the crime scene as there was no physical evidence implicating the defendants. Id.

Also, in State v. Brown, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991), the South Carolina Supreme Court held a trial court's limitation on the defendant's cross examination of a state's witness was not harmless error. The witness testified that in return for her testimony she was allowed to plead guilty to one count of conspiracy for which she could receive a maximum of seven and one-half years. Id. However, the defendant was prevented from asking the witness the punishment for trafficking cocaine, the original charge for the witness. Id. The Court noted that the witness faced a mandatory sentence of at least twenty-five years without parole for the trafficking cocaine charge. Id. The Court held the fact that the mandatory minimum was more than three times the duration she would face on her plea to conspiracy was critical evidence of potential bias. Id. Additionally, the witness's testimony was critical to the prosecution's case because she provided the only evidence of the defendant's knowing involvement in the drug deal. Id. at 171-172, 399 S.E.2d at 594.

On the other hand, in Sims, the Court held the error was harmless because the prosecution's case against the defendant was strong where the defendant's fingerprints were found at the scene, the victim's mother testified the defendant was angry with the victim, and the defendant confessed to two officers. 348 S.C. at 26, 558 S.E.2d at 523. Similarly, this Court held the error was harmless where the testimony provided by the two witnesses whose cross-examination was limited improperly was not the only evidence of the defendant's involvement in the murder. State v. Curry, 370 S.C. 674, 681, 636 S.E.2d 649, 652-653 (Ct. App. 2006). One of the victims unequivocally identified the defendant as the shooter, and a co-conspirator testified regarding the defendant's discussion about the murder

weapon; thus, this Court concluded, the testimony of the two witnesses was cumulative to that given by others. Id. at 681-682, 636 S.E.2d at 653.

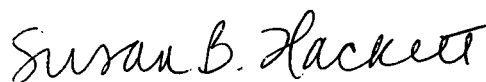
The state's case against Appellant was weak. No physical or forensic evidence linked Appellant to the robbery. The victims were unable to identify Appellant. The officer who chased the individuals from the car was unable to identify Appellant. No items from the robbery were found with Appellant. The only evidence against Appellant was the testimony of Ussery and Barfield. Ussery testified that the third individual involved was named Jamal Bryant and used the nickname Rom. Barfield testified the third individual went by the name of Rom. The state introduced no evidence, except the in-court identifications made by Ussery and Barfield, that Rom and Appellant were one in the same. Therefore, the credibility of Ussery and Barfield was paramount as their testimony was the entire prosecution case against Appellant. Due to the trial court's erroneous limitation on Appellant's cross-examination of Ussery, it is difficult to analyze the nature of the pending charges against Ussery. Although Ussery stated she was charged with accessory before the fact and accessory after the fact, she provided no information regarding the principal crime she was alleged to have aided. In South Carolina, accessory before the fact is "punished in the same manner prescribed for the punishment of the principal felon." S.C. Code Ann. § 16-1-40. Similarly, accessory after the fact is "punished based upon the classification below the punishment provided for the principal offense except for Class A, Class B, Class C felonies, and murder" S.C. Code Ann. § 16-1-55. Therefore, knowing the principal crime is necessary to understanding the potential sentence Ussery faced on the pending charges and any benefit of her bargain. Nevertheless, the fact that Ussery's charges were pending

created a situation in which she was more likely to give biased testimony in hopes of later favorable treatment by the prosecution.

CONCLUSION

The trial court erred in refusing to permit Appellant to question Ussery, an alleged co-conspirator, regarding the sentencing range for her pending charges where the state dismissed two counts of armed robbery after she cooperated with law enforcement. Therefore, this Court should reverse Appellant's convictions and sentences.

Respectfully submitted,



Susan B. Hackett
Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 31st day of January, 2012.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County

D. Craig Brown, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TYRONE WHATLEY,

APPELLANT


PETITION TO BE RELIEVED AS COUNSEL

Counsel for Tyrone Whatley states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge D. Craig Brown, which was held on February 2, 2011, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Tyrone Whatley.

Respectfully submitted,


Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 31st day of January, 2012.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

January 31st, 2012



Susan B. Hackett
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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Florence County
D. Craig Brown, Circuit Court Judge

THE STATE,

RESPONDENT,

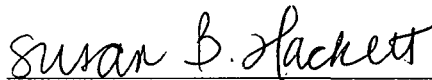
V.

TYRONE WHATLEY,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Anders Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a true copy of the Final Anders Brief of Appellant and Record on Appeal have been served on Tyrone Whatley, #208735 at McCormick Correctional Institution, this 31st day of January, 2012.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 31st day of January, 2012.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: October 2, 2013