THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

The State,

Respondent,

v.

Dennis E. Hoover,

Appellant.

FINAL REPLY BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in admitting 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 trial court err in allowing the alleged victim, Justin Boyce, to testify concerning appellant's feelings toward his brother, Marshall Boyce?

3. Did the trial court err in allowing inflammatory comments and questions by the solicitor during his cross-examination of appellant?

4. Did the cumulative prejudice from the trial court's errors deny appellant a fair trial?

ARGUMENT IN REPLY

Appellant, Dennis E. Hoover, seeks reversal of his conviction for assault and battery in the first degree based on three claims of prejudicial error during his trial and, alternatively, based on the cumulative prejudice resulting from those errors. The state contends the court did not commit reversible error and that certain claims are not preserved for appellate review. This reply is filed to respond to certain assertions made by the state, not to reargue the issues. Appellant adheres to the arguments set forth in his principal brief.

I. THE COURT ERRED IN ADMITTING A REPORT OF A MEDICAL EXAMINATION, AND TESTIMONY CONCERNING THE CONTENTS OF THAT REPORT, UNDER THE BUSINESS RECORDS EXCEPTION TO THE RULE AGAINST HEARSAY.

Appellant challenges the admission of a medical examination report and testimony about that report as inadmissible hearsay. *See* Rule 802, SCRE. The state

contends appellant's argument is not preserved because appellant's trial attorney did not specifically argue the "subjective opinion" language of the business records exception to the rule against hearsay. *See* Rule 803(6), SCRE. Such a specific reference was not necessary to preserve appellant's argument.

Trial counsel specifically raised a hearsay objection and the state argued the document 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 claims the information recited in the report constituted objective, observable facts, not subjective opinions. To the contrary, the document's questions required that the person conducting the examination answer whether certain symptoms of medical conditions were displayed by the individual who was the subject of the examination. Those questions could not be answered without the examiner's medical background, and the answers were the product of the examiner's subjective opinions as to the absence of the symptoms listed in the questions. Such opinions are not admissible under Rule 803(6).

The state does not address appellant's argument concerning the prejudice resulting from the admission of this report. That prejudice is clear. The case turned entirely on the jury's assessment of whom to believe – the complaining witness, Justin Boyce, or the appellant. There was no independent evidence to corroborate one or the other of their accounts of the events. The information in the report of the medical examination contradicted appellant's testimony concerning injuries he suffered and likely influenced the jury in its decision to accept Boyce's version and find appellant guilty. The court's admission of the report is reversible error.

II. THE COURT ERRED IN ALLOWING THE ALLEGED VICTIM, JUSTIN BOYCE, TO TESTIFY CONCERNING APPELLANT'S FEELINGS TOWARD HIS BROTHER, MARSHALL BOYCE.

Appellant challenges the admission of testimony of Justin Boyce concerning appellant's feelings toward his brother, Marshall, without a proper foundation having been laid to establish that the testimony was based on Boyce's personal knowledge. 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 appellant 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 appellant in June 2011 did not open the door to the questions concerning appellant's feelings about Marshall Boyce's involvement with appellant's brother. The testimony concerning appellant'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.

Again, the state does not address the prejudice component of appellant's argument of this issue. As more fully set forth in the principal brief, because of the dearth of evidence to corroborate or refute one or the other account given by the participants in the altercation, the admission of this evidence likely influenced the verdict and cannot be deemed harmless.

III. THE TRIAL COURT ERRED IN ALLOWING INFLAMMATORY COMMENTS AND QUESTIONS BY THE SOLICITOR IN HIS CROSS-EXAMINATION OF APPELLANT.

Appellant raised a claim of reversible error due to inflammatory comments made by the solicitor that crossed the line in three unacceptable ways: (1) a comment that impugned appellant's truthfulness; (2) an expression of the prosecutor's personal opinion as to appellant's propensity toward violence; and (3) questions that suggested appellant was intolerant and bigoted toward gay people. The state does not address the merits of appellant's argument that these comments and questions were improper. The reason is apparent – the comments are inappropriate, inflammatory, and absolutely indefensible.

The state merely contends appellant's argument is not preserved, in several particulars. The state's contention should be rejected and the Court should address the merits of this issue. First, the state claims the specific basis of the argument raised on appeal was not stated in the trial court. No such specificity was required, where the inappropriate nature of each comment and the basis for each objection was apparent. *See* Rule 103(a)(1), SCRE. Second, the state contends the prosecutor's comment about appellant's being in many fights was not preserved because the court never ruled on the objection. Under the circumstances, the absence of an express ruling was tantamount to the court's overruling the objection. Counsel interposed the objection not once, but twice. R. p. 305, line 24; p. 306, lines 2-3. When the court failed to rule, it effectively admitted the line of questioning. The failure of counsel to do more should not be deemed a waiver of this legitimate and meritorious objection to the solicitor's inappropriate comment and injection of his personal opinion on an issue that was off limits in cross-examination – appellant's alleged propensity to violence. Third, the state asserts the

court struck the offending colloquy concerning appellant's feelings toward gays. To the contrary, the court struck only the solicitor's offending question and comment, not appellant's answer. R. p. 325, lines 10-16.

Disingenuously, the state claims 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. This fact demonstrates the compelling nature of appellant's prejudice argument. The entire line of questioning was irrelevant and of no probative value whatsoever. Any discussion of feelings about gays was totally extraneous. However, the prejudicial effect was substantial. *See* Rule 403, SCRE. This questioning allowed the jury's verdict to be influenced by the jurors' own passions and prejudices toward people who are intolerant of others.

With respect to the state's contention that trial counsel got the relief he requested, this Court should nonetheless address the merits of appellant's argument that the solicitor's improper cross-examination of appellant 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 appellant 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 appellant of a trial that was fundamentally fair as required by due process. *See* U.S. Const. amend. XIV; S.C. Const. art. I, § 3.

IV. THE CUMULATIVE PREJUDICE FROM THE TRIAL COURT'S ERRORS DENIED APPELLANT A FAIR TRIAL.

Appellant contends the cumulative prejudice resulting from the trial errors warrants a new trial. Citing *State v. Beekman*, 405 S.C. 225, 746 S.E.2d 483 (Ct. App. 2013), the state claims the cumulative prejudice 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).

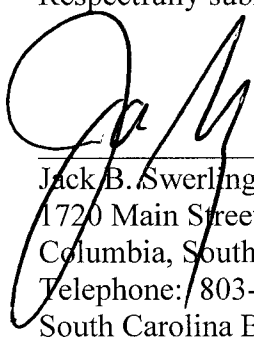
The arguments of Issues I, II, and III were properly preserved with contemporaneous objections. Nothing more was required to enable the appellate court to

assess the cumulative prejudicial effect of two or more errors. If this Court finds the trial court's multiple errors were harmless standing alone, it should review the prejudice resulting from those errors in combination and find that the cumulative prejudice affected the outcome and denied appellant a fair trial. *See* U.S. Const. amends. V, XIV; S.C. Const. art. I, § 3.

CONCLUSION

For the foregoing reasons and the reasons set forth in appellant's principal brief, this Court should reverse and remand for a new trial.

Respectfully submitted,



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CERTIFICATE OF COUNSEL

Counsel hereby certifies that the final reply brief of appellant complies with Rule 211(b) of the South Carolina Appellate Court Rules. Counsel further certifies that the final reply brief of appellant complies with the Order of the Supreme Court of South Carolina, *Re Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings* (April 15, 2014).

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