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 COX .....Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Is the trial court's refusal to charge a proper lesser-included offence to criminal sexual conduct, despite a request by trial counsel, reversible error?

II. Is the trial court's refusal to exclude discussion of the Appellant's recorded jailhouse telephone call, which was never fully disclosed by the State, a reversible violation of Rule 5, S.C. Crim. P.?

III. Is the trial court's refusal to allow re-re-direct examination on the Appellant's recorded jailhouse telephone call, once it was raised on re-cross examination, an abuse of discretion in light of the prejudicial nature of the conversation?

IV. Is the trial court's exclusion of testimony describing the accuser's father's contact with a witness during trial an abuse of discretion?

V. In the alternative, if the foregoing errors are considered "harmless", does their cumulative effect nonetheless mandate reversal?

STATEMENT OF THE CASE

On or about May 26, 2015, Defendant Brandon Lee Cox was arrested for Criminal Sexual Conduct with a Minor, first degree ("CSC") and Sexual Exploitation of a Minor, Third Degree. ("SEM"). (R. pp. 9, 12, 398, 399). S.C. Code §§ 16-3-655(A)(1) & 16-15-410. The State alleged Cox, who at the time was residing in the household of Daniel Ingram, had on or about May 17, 2015, touched the vagina of Ingram's minor daughter while she was asleep at Ingram's house and recorded photographs of the acts on his mobile phone. (R. pp. 72, 74, 178, 398, 399).

Trial took place on June 19-20, 2017, in Pickens, South Carolina. (R. p. 4). Solicitors Chris Jones and Scott Todd represented the State, while attorneys David D. Cantrell, Jr. and Melanie Rumfelt represented Cox. (R. p. 4). The jury was sworn on June 19, 2017, the parties presented their opening statements, and the State began its case-in-chief. At one point during this day, Daniel Ingram approached witness Matthew Chapman and his mother in the parking lot of the courthouse, providing him instruction on how to testify and warning him the State was about to throw Chapman "under the bus" due to an unknown male's DNA being found on the accuser. (R. pp. 222-236).

Trial continued on June 20, 2017. Chapman was eventually called as a witness, but the trial court excluded any examination regarding Ingram's contact the prior day. (R. pp. 236-242). The State rested its case, and Cox presented his defense, which included Cox taking the witness stand on his behalf. During his testimony, Cox mentioned tattoos on his hands that he had obtained in jail. During re-cross, the State questioned Cox regarding a telephone conversation he had with his father about his motivation for getting these tattoos. (R. pp. 302-304). Cox objected, as this statement had not been provided to him pursuant to his Rule 5 / Brady request, though he had been informed of its existence. (R. pp. 2-3, 303-308). The trial court overruled this objection, and further disallowed Cox from engaging in re-re-direct examination of Cox regarding the jailhouse phone call. (R. pp. 309).

After Cox's testimony, the trial court charged the jury. Cox moved to include with the CSC charge a lesser-included offence charge for assault and battery of a high and aggravated nature ("ABHAN"). The trial court denied this motion and charged the jury

with the law of CSC and SEM. The jury returned a guilty verdict on both counts later that evening. (R. pp. 388-389). This appeal followed.

STANDARD OF REVIEW

"The conduct of a criminal trial is left largely to the sound discretion of the trial [court], who will not be reversed in the absence of a prejudicial abuse of discretion." State v. Bryant, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007) accord State v. Douglas, 369 S.C. 424, 632 S.E.2d 845 (2006) (admission or exclusion of evidence); State v. Tyner, 273 S.C. 646, 258 S.E.2d 559 (1979) (extent of re-direct examination). "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." Id.

ARGUMENT

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

The law to be charged to a jury is determined by the evidence presented at trial. State v. Todd, 290 S.C. 212, 349 S.E.2d 339 (1986). A trial judge must charge a lesser included offense if there is any evidence from which the jury could infer the defendant committed the lesser rather than the greater offense. Brightman v. State, 336 S.C. 348, 350-351, 520 S.E.2d 614, 615 (1999). A trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence. State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993).

Trial counsel requested a charge for ABHAN, arguing that it was a lesser-included offense of CSC in the first degree. (R. pp. 316-17). The trial court denied this motion, stating: "There are clearly elements of sexual battery that have to be proven,

which are different from the element[s] of assault and battery of a high and aggravated nature. It's codified." (R. p. 318).

While the trial court was correct that ABHAN is now codified (and with new elements), common law ABHAN is a lesser included offense of first degree CSC. S.C. Code § 16-3-600(B)(1); State v. Primus, 349 S.C. 576, 564 S.E.2d 103 (2002). The South Carolina Legislature abolished common law ABHAN in 2010, but it also created new statutory assault and battery crimes. 2010 S.C. Acts No. 273. Of these statutory crimes, assault and battery in the second degree is the most similar to common law ABHAN.[1] See S.C. Code § 16-3-600(D)(1); State v. Murphy, 322 S.C. 321, 471 S.E.2d 739 (Ct. App. 1996). Further, CSC in the first degree contains all the elements of assault and battery in the second degree, thus the latter passes the so-called "elements test" and is a

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[1] *Assault and Battery in the Second Degree*

> A person commits the offense of assault and battery in the second degree if the person unlawfully injures another person, or offers or attempts to injure another person with the present ability to do so, and:
> (a) moderate bodily injury to another person results or moderate bodily injury to another person could have resulted; or
> (b) the act involves the nonconsensual touching of the private parts of a person, either under or above clothing.

S.C. Code § 16-3-600(D)(1).

Common Law Assault and Battery of a High and Aggravated Nature

> The common law offense of assault and battery of a high and aggravated nature (ABHAN) is an unlawful act of violent injury to another accompanied by circumstances of aggravation. Examples of circumstances of aggravation include the use of a deadly weapon, the infliction of serious bodily injury, the intent to commit a felony, great disparity between the ages and physical conditions of the parties involved, and the difference in the sexes. Other circumstances include indecent liberties or familiarities with a female, the purposeful infliction of shame and disgrace, and resistance to lawful authority.

State v. Murphy, 322 S.C. 321, __, 471 S.E.2d 739, 740-41 (Ct. App. 1996) (citations removed).

lesser included offense of CSC in the first degree. E.g. Knox v. State, 340 S.C. 81, 530 S.E.2d 887 (2000); Murdock v. State, 308 S.C. 143, 417 S.E.2d 543 (1992).

While Cox's trial counsel did not specifically request assault and battery in the second degree, he did request a lesser-included assault charge. Instead of examining whether a lesser form of assault was appropriate, the trial court disallowed *any* lesser-included charge by taking the hyper-technical position that ABHAN was now "codified". This constitutes reversible error, and Cox's conviction must be reversed and remanded for retrial.

II. The Trial Court Wrongfully Considered Cox's Jailhouse Conversation with his Father.

During the cross-examination of Cox, the State raised the issue of jailhouse tattoos on Cox's hands, arguing it was an attempt to differentiate the appearance of his hands from those that appeared in incriminating cell phone videos. (R. pp. 296-299). The trial court allowed re-direct of Cox. (R. pp. 300-302). The trial court then allowed re-cross, where the State then referred to, for the first time in the trial, the substance of a recorded jail telephone conversation Cox had with his father:

> Brandon, isn't it true that on occasion that you talked to your father and that you told him that you watched the video and that the person on the video did not have tattoos on their hands, that you have tattoos on your hands and once you show people that that is the key? And your dad asked you did you have the tattoos before you were in jail and you said yes, that a man named Joe gave them to you. Isn't that true?

(R. p. 303). Cox's trial counsel timely objected, arguing that the statement the State referenced had never been produced, though he had been informed the conversation had occurred. (R. pp. 305-307). When the trial court overruled this objection, Cox's trial counsel requested the trial court allow him to engage in re-re-direct examination of Cox,

which the trial court denied. (R. pp. 308-309). The trial court's admission of this line of questioning is reversible error under several theories:

A. The State's Withholding of Cox's Jailhouse Statement was a Violation of Rule 5, S.C. Crim. P.

Rule 5, S.C. Crim. P. provides in pertinent part: "Upon request by a defendant, the prosecution shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the prosecution..." The record reflects that Cox's trial counsel requested materials pursuant to Rule 5, S.C. Crim. P. and Brady v. Maryland, 373 U.S. 83 (1963), and while the State did disclose the existence of Cox's jailhouse statement, the State admits that it never produced a recording or transcript of this statement. (R. pp. 2-3, 305-307).

For a Rule 5 violation to mandate reversal, the evidence withheld must be "material" and there must be resulting prejudice. State v. Kennerly, 331 S.C. 442, 503 S.E.2d 214 (Ct.App.1998). "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682 (1985).

The jury in this case was presented with damaging testimony that could reasonably create an inference that Cox obtained tattoos on his hands in order to deceive the jury and law enforcement. Cox had no opportunity to address or rebut these allegations once raised by the State. The State, both in its opening and its summation, did argue that Cox was attempting to "trick" the jury with his tattoos. (R. pp. 74, 334-35,

343). Had this unrebutted, prejudicial information not reached the jury, the State could not easily impugn Cox's veracity, thus prejudicing his defense. This Court must reverse the conviction below for this prejudicial violation of Rule 5.

B. Failure to Order Re-Re-Direct Regarding Cox's Jailhouse Statement was an Abuse of Discretion.

The test of whether a limitation on cross-examination is appropriate is "whether the jury possesse[d] sufficient evidence to enable it to make a discriminating appraisal of bias and incentives to lie on the part of the witnesses." United States v. Cropp, 127 F.3d 354, 359 (4th Cir. 1997). Courts have applied this standard to re-re-direct examination. See Salnave v. Ercole, 08-cv-5096-ENV, 2014 WL 3014536 (E.D.N.Y. Order dated July 3, 2014).

The allegations of Cox's jailhouse conversation gave the State an opportunity to make an unanswered attack Cox's credibility. Cox's hands also played a significant part of the State's opening statement and closing argument. (R. p. 74). Considering the frequency that the issue of Cox's hands arose in this action, the jury did not have enough information before it to make a "discriminating appraisal" regarding Cox's tattoos. The prejudicial introduction of this evidence demands Cox's convictions be reversed and this case remanded for a new trial.

III. The Trial Court's Wrongfully Excluded Evidence of the Accuser's Father's Contact with Witnesses.

During the trial of this matter, Daniel Ingram, the father of the accuser, confronted Matthew Chapman, who was a potential witness for the defense. (R. p. 21). During their exchange, Chapman claims "[Ingram] was trying to tell me how to answer questions and he told me some of the evidence the prosecution had in the case." (R. p. 225). Chapman

claimed Ingram told him that because the DNA evidence found on the accuser matched to an unknown male, the State was "going to try to throw [Chapman] under the bus..." (R. pp. 226-27). He also instructed Chapman to testify that he was on a trip with Ingram's family on Memorial Day and that he slept in their house. (R. p. 225). Chapman felt intimidated by this conversation, as Ingram had threatened him before in other contexts.[2] (R. pp. 229, 231). The trial court ruled to exclude examination regarding this conversation, holding under Rule 403, SCRE that the conversation would only serve to confuse the jury. (R. p. 239).

A defendant has the right to cross-examine a witness concerning bias under the Confrontation Clause. Davis v. Alaska, 415 U.S. 308 (1974); State v. Brown, 303 S.C. 169, 399 S.E.2d 593 (1991); U.S. Const. amend. VI; U.S. Const. amend. XIV. "'On cross-examination, any fact may be elicited which tends to show interest, bias, or partiality' of the witness." State v. Brewington, 267 S.C. 97, 101, 226 S.E.2d 249, 250 (1976) (quoting 98 C.J.S. Witnesses § 560a (1957)); see also Rule 608(c), SCRE ("Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced."). "The Confrontation Clause guarantees a defendant the opportunity to cross-examine a witness concerning bias. Considerable latitude is allowed in the cross-examination of an adverse witness for the purpose of testing bias." State v. Brown, 303 S.C. 169, 171, 399 S.E.2d 593 (1991) (citations omitted).

Not only should the trial court have allowed Cox to examine Chapman on his contact with Ingram, it should have allowed Cox to recall Ingram (who had testified at

[2] The State euphemizes Ingram's trial contact with Chapman as "encourage[ment]...to tell the truth..." (Trial Tr. p. 276).

this point) to cross-examine him on this matter. The trial court's refusal to allow examination on this topic is a violation of the Confrontation Clause, has prejudiced Cox as set forth in argument II, and is reversible error.

IV. In the Alternative, the Cumulative Effect of the Errors in this Trial Demand Reversal.

While Cox believes the errors identified in sections I-III are reversible, should this Court find them to be harmless then their aggregate effect nonetheless mandates reversal. Under the doctrine of cumulative error, "the aggregation of errors may produce a cumulative effect of prejudice, where individually, the prejudice is insufficient to justify reversal." State v. Freeman, 319 S.C. 110, 459 S.E.2d 867 (Ct. App. 1995). Additionally:

> ...the court must be alert to avoid even harmless, erroneous rulings that when considered together may undermine the fairness of the factfinding process. Consistent commission of erroneous rulings may well deprive an aggrieved litigant of due process unless the cumulative effect of the errors does not affect the outcome of trial.

Tennant v. Marion Health Care Foundation, 459 S.E.2d 374, n.28 (W.Va. 1995). "Pursuant to the cumulative error doctrine, the cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error." U.S. v. Basham, 561 F.3d 302, 330 (4th Cir. 2009) (internal quotations omitted).

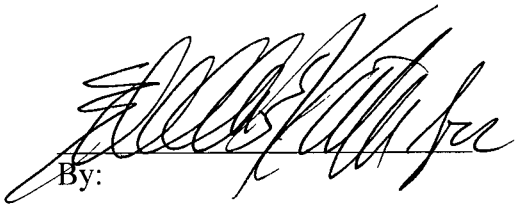
During the trial of this matter, the trial court admitted wrongfully withheld damaging evidence without allowing Cox to rebut it (the jailhouse call), while excluding evidence of misconduct on the part of the accuser's father (Ingram's confrontation of Chapman), and finally denied the jury an opportunity 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

fair trial, and the combined effect of these errors has undermined the factfinding process. Under the cumulative error doctrine, Cox's convictions must be reversed and this action must be remanded for a new trial.

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: 11/5/18

By: 

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CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

November 5, 2018

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