STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Berkeley County

Honorable Deadra L. Jefferson, Circuit Court Judge

RECEIVED

JAN 16 2020

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

ROBERT DAVID NOLEN,

APPELLANT

APPELLATE CASE NO 2019-000591

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in refusing to allow Appellant to cross examine, as evidence of bias, the only witness who was present at the time of the shootings, Fred Mazyck, about the fact that he was never charged by the federal authorities for being a felon in possession of a firearm when he admitted firing weapons in the hours leading up to the shootings?

STATEMENT OF THE CASE

In April of 2018, the Berkeley County Grand Jury indicted Appellant, Robert, David Nolen, for three counts of murder, one count of attempted murder, threatening the life of a public official and possession of a weapon during the commission of a violent crime, indictments #2018-GS-08-840-844, 890. (R. p. ***). In August of 2018, the Berkeley County Grand Jury indicted Appellant for possession of a firearm by a person convicted of a violent offense, indictment #2018-GS-08-1672. (R. p. ***). On March 25, 2019, Appellant appeared before the Honorable Deadra Jefferson and pled guilty to possession of a firearm by a person convicted of a violent offense but proceeded to jury trial on the other charges. Teresa L. Norris, Seth C. Farber and Christina I. Calvar represented Appellant. Kamila Szymzynska-Sas and Bryan Alfaro prosecuted the case. Judge Jefferson accepted the guilty plea but deferred sentencing. The jury found Appellant guilty of the other charges. Judge Jefferson sentenced Appellant to life in prison for the murder charges, thirty (30) years concurrent for attempted murder, five (5) years concurrent for threatening a public official and five (5) years concurrent for possession of a firearm by a person convicted of a violent offense. The judge did not impose sentence for possession of a weapon during the commission of a violent crime based on the life sentences imposed for the murder charges. A timely notice of intent to appeal was served on April 5, 2019. This appeal follows.

STANDARD OF REVIEW

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) ("quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.; see also State v. Brockmeyer, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

ARGUMENT

The trial judge erred in refusing to allow Appellant to cross examine, as evidence of bias, the only witness who was present at the time of the shootings, Fred Mazyck, about the fact that he was never charged by the federal authorities for being a felon in possession of a firearm when he admitted firing weapons in the hours leading up to the shootings.

The jury found Appellant Nolen guilty of the fatal shooting of James Mark Harrison, Harry Gressette and Lance Kenyon. Nolen testified that he shot Harrison and Gressette in self-defense after they accused Nolen and Kenyon of stealing their crystal meth. (Tr. pp. 732-745). Nolen testified that he accidently shot Kenyon, thinking he was Harrison. (Tr. pp. 746-748). At the time of the shooting Nolen was staying with Kenyon. (Tr. p. 711, lines 2-13). Harrison and Gressette were at Kenyon's home visiting. Fred Mazyck was a neighbor and was also visiting Kenyon's home on the night of the shooting. (Tr. p. 448, line 1 – p. 449, lines 1-19).

Earlier in the day Nolen, Kenyon and Mazyck were target practicing in the backyard with various guns including handguns, a 22 rifle and a military style weapon that used a stand. (Tr. p. 451, line 2 – p. 452, 453, lines 1-11). After target practice the three men went into town to the grocery store and the liquor store to buy supplies in preparation for a predicted hurricane. (Tr. p. 454, lines 1-25). The three men returned to Kenyon's home and began drinking and watching movies. (Tr. p. 455, lines 7-20). Harrison and Gressette arrived at the house later. At some point Nolen, Kenyon, Harrison and Gressette went outside and Mazyck remained inside watching television. (Tr. p. 725, lines 17 – 25; p. 455, line 21 – p. 456, lines 1-9).

Mazyck testified that he fell asleep but was awakened by gunfire. Mazyck testified:

> So I laid back with that movie, and I went to sleep, and I woke up to gunfire. And the next thing I know I heard somebody come through the kitchen, and it was him. He came in and he got off two shots, and I got up off the chair and stuff. And he told me that I just killed everybody outside. I'm tired of them messing with me.

(Tr. p. 456, lines 10-16).

Nolen's testimony differed. Nolen testified that the four men, Nolen, Kenyon, Harrison and Gressette, went outside and eventually Kenyon brought out the SCAR 17, military style weapon. (Tr. p. 726, line 1 – p. 727, lines 1-25). The men shot the weapon. (Tr. p. 728, lines 2-7). Nolen showed Gressette a 243 rifle and his nine- millimeter pistol. (Tr. p. 728, line 21 – p. 729, lines 1-18). Nolen testified that the four men continued to drink and at one point he and Gressette went back into the house and Nolen was so drunk that he fell down, bringing Gressette with him. (Tr. p. 730, line 20 – p. 731, lines 1-16). Nolen testified that he realized he was drunk so he sat down in the living room and fell asleep. (Tr. p. 731, lines 18-21).

Nolen testified he was awakened by Fred Mazyck. Nolen testified, "I woke up to somebody shaking me saying, Robby, Robby. When I finally came to it's Fred. And I say, what? Fred, what do you want? And he said, they're fighting, they're fighting. Who's fighting, Fred? He said, they're fighting with Lance." (Tr. p. 732, lines 1-6). When Nolen went to the back porch to investigate, he was attacked by Gressette who held the 243 rifle against his head. (Tr. p. 732, line 7- p. 733, lines 1-15). Nolen could hear Harrison accusing Nolen and Kenyon of stealing an ounce of crystal meth. (Tr. p. 733, lines 21-24). Nolen was able to get back in the house where he loaded a small 22 rifle and told Mazyck to call 911. (Tr. p. 738, line 7 – p. 739, lines 1-25). Mazyck, in a statement, told police that Nolen told him to call the police. (Tr. p. 490, lines 22-25). At trial, however, Mazyck did not remember making that statement and testified that it did not happen that way. (Tr. p. 490, line 25 – p. 491, lines 1-6).

Nolen testified that when he went back outside Harrison fired a 9 mm gun and he thought Harrison had just shot Kenyon. (Tr. p. 743, lines 2-16). Nolen testified that he grabbed the 22 and started shooting. (Tr. p. 743, lines 18-24). Nolen shot Harrison, Gressette and Kenyon. Nolen testified that when he asked Mazyck where the police were, Mazyck told him he did not

call the police because he was scared and they needed to get the drugs out of the house. (Tr. p. 749, lines 6-21). Eventually, Mazyck left Kenyon's house and called 911 from his cousin's house. (Tr. p. 469, line 2 – p. 470, lines 1-18). Nolen was finally able to locate his phone and also called 911. (Tr. p. 755, lines 16 – p. 756, lines 1-4). When the police arrived they found Nolen performing chest compressions on Kenyon. (Tr. p. 258, lines 2-10). When EMS arrived Harrison and Gressette were dead. Kenyon died in the ambulance on the way to the hospital. (Tr. p. 367, line 8 – pp. 368-371, lines 1-10).

Prior to trial Appellant sought to question Mazyck about the fact that he had not been charged federally with being a felon in possession of a firearm. (Tr. p. 106, line 3 – pp. 107-112). In statements to police Mazyck admitted that he used and possessed firearms on October 7, 2017, the day of the shooting. (Tr. p. 108, lines 14-19). Mazyck has a felony conviction for possession with intent to distribute marijuana. (Tr. p. 108, line 14 – p. 109, lines 1-7). Appellant argued that the fact that Mazyck was not prosecuted went to bias. (Tr. p 108, lines 5-8). The judge found that the state prosecutors had not offered Mazyck anything in exchange for his testimony and were not in a position to offer anything with regard to federal charges. (Tr. p. 110, lines 11 – p. 111, lines 1-23). The judge ruled, "At this time, it's speculative. I understand that there is – there is wide breadth and latitude in cross-examining a witness as to prejudicial prejudice and their credibility, but you don't -- there are limits on that and there are parameters on that. And I haven't heard anything to this point that convinces me that it would be appropriate; but prior to going into it, make me aware of it, and I will be glad to create a proffer and heat[r] the testimony in its context." (Tr. p. 112, lines 12-22).

After Mazyck testified before the jury, Appellant proffered the questioning in regard to the fact that Mazyck was not charged federally with being a felon in possession of a firearm.

(Tr. p. 507, lines 17 – p. 508, 509, lines 1-21). The State objected to the questioning arguing that there were no promises made and the questioning allowed the introduction of improper character evidence. (Tr. p. 511, lines 7-13). The judge sustained the State's objection. (Tr. pp. 511-516). The trial judge erred.

In State v. Mizzell, 349 S.C. 326, 331, 563 S.E.2d 315, 317 (2002), the South Carolina Supreme Court wrote:

> A defendant has the right to cross-examine a witness concerning bias under the Confrontation Clause. Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); State v. Brown, 303 S.C. 169, 399 S.E.2d 593 (1991). " '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* 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.").
>
> A criminal defendant may show a violation of the Confrontation Clause "by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness.' " Delaware v. Van Arsdall, 475 U.S. 673, 680, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674, 684 (1986). The trial judge retains discretion to impose reasonable limits on the scope of cross-examination. State v. Sherard, 303 S.C. 172, 399 S.E.2d 595 (1991); *accord* Delaware v. Van Arsdall, *supra.* Before a trial judge may limit a criminal defendant's right to engage in cross-examination to show bias on the part of the witness, the record must clearly show the cross-examination is inappropriate. State v. Graham[1], *supra.* If the defendant establishes he was unfairly prejudiced by the limitation, it is reversible error. State v. Brown, *supra.*

In Mizzell the Court found that the trial court erred in limiting cross-examination of a witness about the possible punishment he could receive if convicted of the crimes charged. In the present case the trial court erred in limiting the cross-examination of Mazyck. The cross-examination of Mazyck about the fact that he was not prosecuted federally for being a felon in

[1] 314 S.C. 383, 444 S.E.2d 525 (1994).

possession was appropriate and tended to show bias in the same way that cross-examination about possible punishment shows bias.

Rule 608(c), SCRE provides that, "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." In State v. McEachern, 399 S.C. 125, 140–41, 731 S.E.2d 604, 611–12 (Ct. App. 2012), the South Carolina Court of Appeals wrote:

> Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony." State v. Pipkin, 359 S.C. 322, 327, 597 S.E.2d 831, 833 (Ct.App.2004) (quoting U.S. v. Abel, 469 U.S. 45, 52, 105 S.Ct. 465, 469, 83 L.Ed.2d 450 (1984)). Rule 608(c), SCRE, "preserves South Carolina precedent holding that generally, 'anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony.' " State v. Jones, 343 S.C. 562, 570, 541 S.E.2d 813, 817 (2001) (quoting State v. Brewington, 267 S.C. 97, 226 S.E.2d 249 (1976)).

Appellant Nolen was prohibited from engaging in appropriate cross-examination of Mazyck designed to show bias and expose to the jury facts from which the jurors could appropriately draw inferences as to the reliability of his testimony. Nolen should have been allowed to argue to the jury that Mazyck gave testimony favorable to the State in order to avoid federal prosecution for being a felon in possession of a firearm. The fact that the State prosecutor made no promises to Mazyck and had no control over whether federal charges were brought does not remove the potential bias. The trial judge erred in limiting the cross-examination.

The error was not harmless. Also in State v. Mizzell, 349 S.C. 326, 333, 563 S.E.2d 315, 318–19 (2002), the South Carolina Supreme Court wrote:

> Our inquiry does not end upon finding the trial court committed an error in limiting the cross-examination of Steele. "A violation of the defendant's Sixth Amendment right to confront the witness is not *per se* reversible error" if the "error was harmless beyond a reasonable doubt." Graham, 314 S.C. at 385, 444

> S.E.2d at 527. Whether an error is harmless depends on the particular facts of each case and upon a host of factors 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.
>
> Van Arsdall, 475 U.S. at 684, 106 S.Ct. at 1438, 89 L.Ed.2d at 686; *see* State v. Clark, 315 S.C. 478, 445 S.E.2d 633 (1994) (applying Van Arsdall factors); *see also* State v. Graham, *supra,* (the Van Arsdall factors are not exhaustive).

Mazyck's testimony was important for the State to establish that Appellant Nolen did not act in self-defense. Mazyck's claim that Appellant stated, ". . . I just killed everybody outside. I'm tired of them messing with me." (Tr. p. 456, lines 10-16), was important for the State's case and contradicted Appellant's self-defense claim. Mazyck's testimony was not cumulative as he was the sole surviving witness other than Appellant. While Appellant was able to cross-examine Mazyck about changing his trial testimony from his original statement that Appellant told him to call the police, the jury did not have the context as to why he potentially changed his testimony. The jury should have known that Mazyck was not proscecuted federally for being a felon in possession of a firearm in order to properly assess his credibility.

In State v. Nash, 475 So. 2d 752 (La. 1985), the Louisiana Supreme Court reversed a manslaughter conviction because the defendant was denied the right of effective cross-examination. The case involved a drug deal and one of the State's witnesses, Winters, was on parole from Oklahoma. Nash asserted self-defense and the testimony from the witness was important for the State to prove that Nash did not act in self-defense. The witness was not prosecuted by the State for his involvement in the drug deal. The Louisiana Supreme Court wrote:

> Similarly, in the present case while defense counsel may have been permitted to show a possible general lack of credibility by asking Winters if he had ever been convicted, counsel was unable to make a record from which to argue the most

> convincing reason why Winters might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial. Defense counsel should have been allowed to attempt to show and to argue that Winters gave testimony favorable to the state's case in order to avoid imprisonment, either as a result of an Oklahoma parole revocation or a Louisiana prosecution for distribution of marijuana, or both. This possible bias is more compelling impeachment than the prior conviction brought out in the general attack on Winters' credibility. On the facts of this case, to make fully effective use of his right to confront and cross-examine the witness, defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. Defendant was thus denied the right of effective cross-examination, a constitutional error in the first magnitude which no amount of showing of want of prejudice would cure. Davis v. Alaska, *supra,* 415 U.S. at 318, 94 S.Ct. at 1111; Brookhart v. Janis[2], *supra;* Smith v. Illinois[3], *supra.*

State v. Nash, 475 So. 2d 752, 755–56 (La. 1985).

In the present case defense counsel should have been allowed to attempt to show and to argue that Mazyck gave testimony favorable to the State of South Carolina hoping to avoid federal prosecution for being a felon in possession of a firearm in the same way that Nash should have been able to show and argue that Winters gave testimony favorable to the State of Louisiana hoping to avoid a parole violation in Oklahoma. Appellant Nolen was denied the right of effective cross-examination. The trial judge abused her discretion by limiting cross-examination. The error was not harmless.

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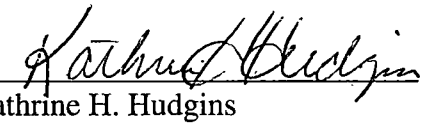
[2] 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966).

[3] 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 956 (1968).

CONCLUSION

Based on the above argument, this Court should reverse the convictions and remand for a new trial.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of January, 2020.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Melody J. Brown, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Robert David Nolen, #379673, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 16th day of January, 2020.

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 16th day of January, 2020.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: September 30, 2029