

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM EDGEFIELD COUNTY
Court of General Sessions

Honorable D. Craig Brown, Circuit Court Judge

Appellate Case No. 2017-002224

Case Nos. 2017-GS-19-01817,
2017-GS-19-01818,
2017-GS-19-01819, and
2015-GS-19-00351

ORIGINAL

The State,.....Respondent,

v.

Montrell Deshawn Troutman,.....Appellant.

FINAL REPLY BRIEF OF APPELLANT

RECEIVED
MAR 26 2019
SC Court of Appeals

Wm. Grayson Lambert
BURR & FORMAN LLP
Post Office Box 11390
Columbia, S.C. 29211
(803) 799-9800

Robert Michael Dudek
Chief Appellate Defender
Post Office Box 11589
Columbia, S.C. 29211
(803) 734-1343

Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. The State Ignores the Factual Disputes that Are Critical to the Issue on Appeal.....	2
II. Troutman Was Denied His Constitutional Right to Cross-Examine Mathis.....	3
A. The State Takes an Isolated Approach to Mathis's Proffer that Disregards Facts that Support Troutman's Theory and Made Cross-Examination of Mathis Reasonable.....	4
B. Mathis Was Not Sufficiently Impeached by Being Asked about His Conviction for Lying to Police	7
III. The Denial of Troutman's Confrontation Clause Right Was Not Harmless.....	8
A. Mathis's Testimony Was Critical to the State's Case	9
B. The Other Evidence Is Not Overwhelming, Given the Facts that Fit with Troutman's Theory but Not with the State's Theory	10
CONCLUSION	12

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Alaska v. Davis</i> , 415 U.S. 308 (1974)	9, 11
<i>Burlington N. & Santa Fe Ry. Co. v. White</i> , 548 U.S. 539 (2006).....	7
<i>Delaware v. Van Arsdall</i> , 475 U.S. 673 (1986).....	3, 8
<i>Doe v. Baum</i> , 903 F.3d 575 (6th Cir. 2018)	1
<i>State v. Clark</i> , 315 S.C. 478, 445 S.E.2d 633 (1994)	7
<i>State v. Dickey</i> , 394 S.C. 491, 716 S.E.2d 97 (2011)	10
<i>State v. Gillian</i> , 360 S.C. 433, 602 S.E.2d 62 (Ct. App. 2004).....	6
<i>State v. Gracely</i> , 399 S.C. 363, 731 S.E.2d 880 (2012)	3
<i>State v. Holder</i> , 382 S.C. 278, 676 S.E.2d 690 (2009)	8
<i>State v. Mizzell</i> , 349 S.C. 326, 563 S.E.2d 315 (2002)	3, 6
<i>State v. Pearson</i> , 415 S.C. 463, 783 S.E.2d 802 (2016)	2
<i>State v. Perez</i> , 423 S.C. 491, 816 S.E.2d 550 (2018)	8, 11
<i>State v. Provet</i> , 391 S.C. 494, 706 S.E.2d 513 (Ct. App. 2011).....	7

<i>State v. Wallace</i> , 44 S.C. 357, 22 S.E. 411 (1895)	1
<i>State v. Wigington</i> , 375 S.C. 25, 649 S.E.2d 185 (Ct. App. 2007)	10
<i>United States v. Branch</i> , 537 F.3d 328 (4th Cir. 2008)	7
<i>Watkins v. Sowders</i> , 449 U.S. 341 (1981)	1
<i>Xcaliber Int’l, Ltd. LLC v. Georgia ex rel. Carr</i> , 253 F. Supp. 3d 1220 (N.D. Ga. 2017)	7

Other Authorities

<i>Black’s Law Dictionary</i> (9th ed. 2009)	4
<i>Bartlett’s Familiar Quotations</i> (Justin Kaplan ed. 17th ed. 2002)	5

ARGUMENT

The State repeatedly calls Troutman's argument about Mathis's bias "rank speculation." Appellee's Br. 8, 10. Simply saying that, however, doesn't make it true. Far from the fishing expedition the State claims it is, Troutman's argument is the only theory that makes sense of unexplained facts—facts like Merriweather claiming that he was going to get his gun and getting back in his car briefly during the heated exchange with Troutman in the moments before the shooting and facts like Mathis fleeing from the side of his dying best friend before the police arrived.

Both at trial and on appeal, the State never engaged with these facts. But these facts fit neatly into a theory that Troutman has put forth. For the jury to accept this theory, Troutman had to discredit Mathis's testimony. After all, given Mathis's major role in the events of June 6, 2015, his testimony was a key part of the State's case (a concession that the State makes but tries to gloss over in its harmful-error analysis). One way to do that was by exposing Mathis's bias on cross-examination.

The Sixth Amendment's Confrontation Clause guarantees Troutman the right to expose that bias. *See, e.g., Watkins v. Sowders*, 449 U.S. 341, 349 (1981); *State v. Wallace*, 44 S.C. 357, 22 S.E. 411, 412 (1895). In fact, the right to confront witnesses is so effective for revealing bias that the U.S. Court of Appeals for the Sixth Circuit recently observed that this right is "the greatest legal engine ever invented for uncovering the truth" and has thus been a central focus in popular movies such as *A Few Good Men*. *Doe v. Baum*, 903 F.3d 575, 581 & n.1 (6th Cir. 2018).

Although Jack Nicholson's breakdown on the witness stand as Colonel Nathan Jessup in *A Few Good Men* (his "you can't handle the truth" line) may be more famous than the cross-examination of Mathis in this case, the role of cross-examination here is more important: this involves real life, not the movies. When Troutman was not permitted to question Mathis about his bias, Troutman's right under the Sixth Amendment was violated. To remedy that right, he is entitled to a new trial, at which he is permitted to expose Mathis's bias to the jury on cross-examination.

I. The State Ignores the Factual Disputes that Are Critical to the Issue on Appeal.

In its cursory recounting of the facts of this case, the State recites only those facts that fit into its theory of the case. Thus, it cites the testimony about the fight at Merriweather's house being between Merriweather and Troutman, and it ignores the testimony that the fight started between Merriweather and Dwayne Jones, with Merriweather then confronting Troutman during the cookout at Merriweather's house. See Appellee's Br. 3. And it tells only one side of the story of what happened in the moments before the shooting, disregarding what Troutman said transpired and even part of what the State's own witnesses said. See Appellee's Br. 3-4.

Were this an appeal challenging the sufficiency of the evidence, the State's approach would be appropriate. When the sufficiency of the evidence is the issue on appeal, the Court must view the evidence in the light most favorable to the State. See, e.g., *State v. Pearson*, 415 S.C. 463, 470, 783 S.E.2d 802, 806 (2016).

But this case isn't about the sufficiency of the evidence. It's about the Confrontation Clause. Knowing these other facts is essential to evaluating

Troutman's claim that he was wrongly denied the chance to probe Mathis about his bias. *See State v. Gracely*, 399 S.C. 363, 372, 731 S.E.2d 880, 885 (2012) (holding that a criminal defendant must be permitted cross-examine a witness "to show a prototypical form of bias from which jurors could draw inferences relating to the reliability of the witness" (internal alterations omitted) (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986))). Only by engaging with the evidence that didn't fit the State's theory can the Court determine whether "the record . . . *clearly* show[s] the cross-examination is inappropriate." *State v. Mizzell*, 349 S.C. 326, 331, 563 S.E.2d 315, 317 (2002) (emphasis added).

That means that the conflicting versions of what happened at Merriweather's house on the afternoon of June 6, 2015 must be considered. So too with the different stories of the moments leading up to the shooting. What Mathis did in the moments after the shooting (when he fled the scene before police arrived, leaving his close friend in his final moments) is likewise relevant here. All of this evidence—which does not fit neatly within the State's theory, given its omission from the State's brief—is important in determining whether Troutman was denied his constitutional right to confront the witnesses against him.

II. Troutman Was Denied His Constitutional Right to Cross-Examine Mathis.

The State does not dispute the central role that cross-examination plays in discerning the truth. Indeed, it cites many of same cases from the South Carolina Supreme Court and the United States Supreme Court on which Troutman relied. The issue here is thus whether Troutman was denied his Sixth Amendment right.

He was. The State's position that the Confrontation Clause wasn't violated here boils down to two points. First, the State claims that nothing in the proffer supports a conclusion that Mathis took a gun away from the scene of the shooting. See Appellee's Br. 7. Second, it posits that Mathis was already "sufficiently impeached" by being asked about his conviction for giving false information to police. Appellee's Br. 8. Neither argument has merit.¹

A. The State Takes an Isolated Approach to Mathis's Proffer that Disregards Facts that Support Troutman's Theory and Made Cross-Examination of Mathis Reasonable.

As for its first argument, the State takes a myopic view of the evidence, focusing exclusively on the proffer. During that exchange with Troutman's counsel, Mathis denied that his 2011 conviction for giving false information to police involved "covering up" for Merriweather. (R. p. 188, lines 19–23). Mathis's bland denial cannot bear the weight that the State's argument places on it.

As an initial matter, the State's reliance on this denial ignores the idea that someone who has lied once will likely lie again. Cf. *Black's Law Dictionary* 679 (9th ed. 2009) (defining *falsus in uno, falsus in omnibus* to mean that "if a jury believes that a witness's testimony on a material issue is intentionally deceitful, the jury may disregard all of that witness's testimony"). Or, as Thomas Jefferson put it, "He who

¹ The State never explicitly acknowledges that a criminal defendant's Confrontation Clause right to expose a witness's bias allows for questioning that might not otherwise be permitted under the Rules of Evidence. But the State appears to concede as much in the opening paragraph of its argument, when it argues that because Troutman didn't "establish any evidence of bias," he was limited to cross-examining Mathis under Rule 609(a)(2), SCRE. Appellee's Br. 6.

permits himself to tell a lie once, finds it easier to do it a second and third time, till at length it becomes habitual.” *Bartlett’s Familiar Quotations* 357 (Justin Kaplan ed. 17th ed. 2002) (quoting Thomas Jefferson, Letter to Peter Carr (Aug. 19, 1785)).

This concept makes clear that if Mathis was willing to lie to police in 2011, he presumably was willing to lie about why he lied, and he was willing to lie again about the events of June 6, 2015. In fact, Mathis—despite initially admitting his conviction about lying to police—later lied on the witness stand about having lied to police. (R. p. 184, lines 12–16). Thus, it’s not a leap for a jury to conclude that he had lied about what happened on June 6 between Merriweather and Troutman. Therefore, his simple denial in his proffer of having covered for Merriweather in 2011 is no basis for concluding that Troutman lacked a basis for pursuing his questions about Mathis’s bias.

Additionally, the State’s argument on the proffer disregards other evidence in the record. Not only did Troutman testify that Merriweather claimed he was going to get his own gun in the moments before the shooting, Santonio Ryans (the State’s witness) also testified that Merriweather said this, right before briefly getting back in his car and then continuing his altercation with Troutman. (R. p. 146, lines 8–13; p. 363, lines 11–15; p. 410, line 10). Even if Merriweather did not grab a gun when he got back in his car, his claim that he was going to get his gun, followed by his quick move into his car, could have raised Troutman’s worry that Merriweather might shoot him first.

The State's narrow focus on the proffer also ignores the fact that Mathis fled the scene before police arrived. That simple fact is, upon reflection, stunning. Merriweather had been shot and was clearly in dire condition. Merriweather was Mathis's "really good friend[]." (R. p. 180, lines 14-15). Police arrived within a mere five minutes. (R. p. 290, lines 20–p. 291, line 1). Rather than wait this short period of time to provide aid and comfort to his friend and to help the police know who shot Merriweather, Mathis took off.

This necessarily raises the question of why Mathis fled the scene. One reasonable explanation is that Mathis was trying—once again—to protect his good friend Merriweather by making sure that Merriweather wasn't also found with a gun when police started searching the scene.

Troutman's attempt to cross-examine Mathis therefore was not "rank speculation" or a "fishing expedition," as the State describes it. It was a legitimate, reasonable attempt to expose Mathis's bias. *See State v. Gillian*, 360 S.C. 433, 451, 602 S.E.2d 62, 71 (Ct. App. 2004) (explaining that a trial court may impose only "reasonable limits on the scope of cross-examination"), *aff'd as modified*, 373 S.C. 601, 646 S.E.2d 872 (2007). With these facts about Merriweather claiming that he was going to get a gun and Mathis fleeing the scene, the record did not "clearly" show that this cross-examination was inappropriate. *Mizzell*, 349 S.C. at 331, 563 S.E.2d at 317. Nothing in the limitation of cross-examination here was necessary to prevent "harassment, prejudice, [or] confusion of the issues," to ensure "witness' safety," or to avoid "interrogation that is repetitive or only marginally relevant." *Id.* Rather, this

limitation denied Troutman the “[c]onsiderable latitude [that] is allowed in the cross-examination of a witness for potential bias” and that would have made sense of facts that the State did not (and could not) explain. *State v. Clark*, 315 S.C. 478, 481, 445 S.E.2d 633, 634 (1994).

B. Mathis Was Not Sufficiently Impeached by Being Asked about His Conviction for Lying to Police.

The State’s second contention for why Troutman’s Confrontation Clause right was not violated fares no better. Mathis was asked about his conviction for giving false information to police by the State, in an apparent attempt to preempt Troutman from drawing out that conviction and soften its blow to the jury. (R. p. 179, lines 9–11). The State insists that this short question-and-answer was sufficient to impeach Mathis.

This simple question and answer, devoid of any context, was far from sufficient cross-examination. As courts have repeatedly recognized, context matters. *Cf. Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 69 (2006) (declaring that “[c]ontext matters” when evaluating factual scenarios); *United States v. Branch*, 537 F.3d 328, 336 (4th Cir. 2008) (explaining that “context matters: actions that may appear innocuous at a certain time or in a certain place may very well serve as a harbinger of criminal activity under different circumstances”) (quoted by *State v. Provet*, 391 S.C. 494, 505, 706 S.E.2d 513, 519 (Ct. App. 2011)); *Xcaliber Int’l, Ltd. LLC v. Georgia ex rel. Carr*, 253 F. Supp. 3d 1220, 1238 (N.D. Ga. 2017) (“As per usual, however, context is king.”).

Mathis's conviction for lying to police did not involve something without any similarities to this case. It wasn't about having an open container during a traffic stop, his tax returns, or even about a domestic-violence incident. Rather, it was about Merriweather, a gun, and a shooting. That context may well have impacted the jury's evaluation of Mathis's conviction and his credibility. Without this context, the cross-examination was not constitutionally sufficient.

III. The Denial of Troutman's Confrontation Clause Right Was Not Harmless.

A Confrontation Clause violation mandates reversal whenever the violation was not harmless. Our Supreme Court, relying on the U.S. Supreme Court precedent, has repeatedly listed the important factors to consider in analyzing whether a Confrontation Clause error is harmless: "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. Perez*, 423 S.C. 491, 498, 816 S.E.2d 550, 554 (2018) (quoting *Van Arsdall*, 475 U.S. at 684). Proving that an error is harmless is a high burden. *See State v. Holder*, 382 S.C. 278, 285, 676 S.E.2d 690, 694 (2009) (explaining that an error is harmless only "if the evidence is overwhelming and the violation so insignificant by comparison that [a court is] persuaded, beyond a reasonable doubt, that the violation did not affect the verdict").

The State says that it has met this burden here, calling any violation of the Confrontation Clause "entirely harmless." Appellee's Br. 9, 10. Hardly so.

A. Mathis's Testimony Was Critical to the State's Case.

The State tries to gloss right over the importance of Mathis's testimony—the very first factor on this list. In a passing comment, the State admits that Mathis's testimony “was significant.” Appellee's Br. 9.

But it says nothing more about this factor. Understandably so, as even a cursory consideration of this factor makes clear that it weighs heavily against a finding of harmless error. Mathis was a key witness for the State. He was an eyewitness to the confrontation between Troutman and Merriweather in the moments before the shooting, and Troutman said that Mathis even raised a bottle to throw at him, turning Mathis into a participation in this confrontation. (R. p. 147, line 24–p. 148, line 1; p. 364, lines 4–9; p. 395, line 14–p. 396, line 13).

The U.S. Supreme Court's decision in *Alaska v. Davis*, 415 U.S. 308 (1974), is instructive here: In that case, a “crucial witness for the prosecution” was a young man who had seen the defendant with the stolen safe on the day of the crime. *Id.* at 309–10. This witness had a juvenile record that could have been used to impeach him, but the trial court limited cross-examination in such a way that the defendant's “counsel was unable to make a record from which to argue why [the witness] might have been biased.” *Id.* at 318. The Supreme Court reversed the defendant's convictions based on this Confrontation Clause violation. *Id.* at 320–21.

Just like the defendant in *Davis*, Troutman's right to confront a crucial witness was limited in a way that prevented him from making a record that showed that witness's bias. The limited cross-examination here may have disclosed Mathis's

friendship with Merriweather and conviction for lying to police, but Troutman did not have the opportunity flesh out how those two things were connected in a way that was relevant to the facts in this case.

B. The Other Evidence Is Not Overwhelming, Given the Facts that Fit with Troutman's Theory but Not with the State's Theory.

While ignoring the critical role of Mathis's testimony, the State focuses heavily on the fact that Merriweather was unarmed at the time of the shooting. But this isolated fact does not make the Confrontation Clause violation harmless.

Troutman never denied shooting Merriweather; he did, however, claim that Merriweather initiated the altercation and he (Troutman) feared for his life. (R. p. 364, lines 8–9; p. 367, line 22–p. 368, line 1). Part of what gave rise to this fear was Merriweather's saying that he was going to get his gun and then getting back in his car for a moment before continuing his argument with Troutman.

This fear was an important issue for Troutman's defense. *See State v. Dickey*, 394 S.C. 491, 501, 716 S.E.2d 97, 102 (2011) ("Word accompanied by hostile acts may, depending on the circumstances, establish a plea of self-defense."). Even if a gun wasn't visible at the moment of the shooting, the jury could have reasonably concluded that Merriweather's actions made Troutman believe that he was in imminent danger, in light of the incident at Merriweather's house earlier that day, Merriweather's claim that he was going to get his gun, and Merriweather's aggressive approach toward Troutman. *Cf. State v. Wigington*, 375 S.C. 25, 35, 649 S.E.2d 185, 190 (Ct. App. 2007) (holding that the elements of self-defense were not met when a prior altercation

between the defendant and victim was six years old and the victim did not approach the defendant during the incident).

Moreover, the State's focus on the fact that Merriweather wasn't holding a gun at the moment of the shooting does not mean that Merriweather didn't have a gun in his car. Indeed, all of the testimony to which the State has pointed focused on whether Merriweather had a gun at the moment of the shooting when Merriweather was charging at Troutman, not whether Merriweather had a gun in his car that he could have gotten. See Appellee's Br. 4 (citing Tr. pp. 346, 369, 398–399, 419–20, 652). Likewise, the fact that police never found a second gun does not mean that Merriweather didn't have a gun in his car. If Troutman's theory of Mathis's flight from the scene is correct, then that means that Mathis was successful in covering up for his friend.

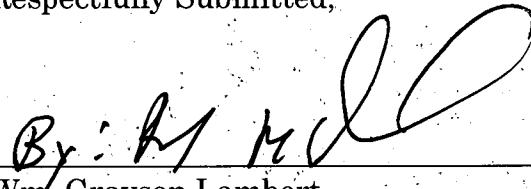
To provide the jury with reasonable doubt, Troutman had to have the opportunity expose Mathis's bias in sufficient detail to reveal for the jury how close Mathis and Merriweather were and how Mathis had, in the past, tried to protect his friend after a shooting incident. See *Davis*, 415 U.S. at 317 (recognizing that cross-examination must be permitted so that a defendant can expose the "biases prejudices, or ulterior motives of the witness as they may relate directly to issues or *personalities* in the case" (emphasis added)). Troutman had the right to present this bias to the jury, which had the exclusive right to evaluate how credible Mathis was based on all of the facts. See *Perez*, 423 S.C. at 499, 816 S.E.2d at 554–55.

Troutman was denied that right when it came to cross-examining Keith Lamont Mathis. And given the central role that Mathis played in the State's case, it's impossible to conclude that this violation of Troutman's Sixth Amendment right was harmless beyond a reasonable doubt.

CONCLUSION

The judgment should be vacated, and the case should be remanded for a new trial.

Respectfully Submitted,

By: 
Wm. Grayson Lambert
BURR & FORMAN LLP
Post Office Box 11390
Columbia, S.C. 29211
(803) 799-9800

Robert Michael Dudek
Chief Appellate Defender
Post Office Box 11589
Columbia, S.C. 29211

Counsel for Appellant

March 26, 2019
Columbia, SC

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM EDGEFIELD COUNTY
Court of General Sessions

Honorable D. Craig Brown, Circuit Court Judge

Appellate Case No. 2017-002224

Case Nos. 2017-GS-19-01817,
2017-GS-19-01818,
2017-GS-19-01819, and
2015-GS-19-00351

The State,.....Respondent,

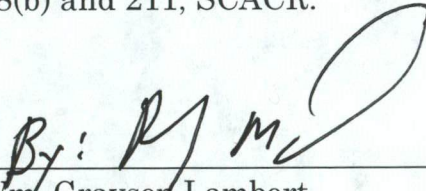
v.

Montrell Deshawn Troutman,.....Appellant.

CERTIFICATE OF COMPLIANCE

This Reply Brief complies with Rules 208(b) and 211, SCACR.

RECEIVED
MAR 26 2019
SC Court of Appeals

By: 

Wm. Grayson Lambert
BURR & FORMAN LLP
Post Office Box 11390
Columbia, S.C. 29211
(803) 799-9800

Robert Michael Dudek
Chief Appellate Defender
Post Office Box 11589
Columbia, S.C. 29211

March 26, 2019