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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ABBEVILLE COUNTY
COURT OF GENERAL SESSIONS

Donald B. Hocker, Circuit Court Judge

Appellate Case No.: 2019-001902

The State of South Carolina.....Respondent,

v.

Kenneth Earle McGill.....Appellant.

APPELLANT'S FINAL REPLY BRIEF

William Norman Epps III
Post Office Box 2167
Anderson, South Carolina 29622
(864) 224-2111
Attorney for Appellant

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ARGUMENT

1. THE TRIAL COURT ERRED IN FAILING TO FIND THE INDICTMENT DUPLICITOUS AND APPELLANT'S ACTIONS DID NOT CONSTITUTE A CONTINUOUS COURSE OF CONDUCT NOR WAS THIS ARGUED OR RAISED TO THE TRIAL COURT

The State argues that McGill's indictment was not duplicitous and did not require a special jury instruction because McGill was charged, pursuant to S.C. Code Ann. Section 44-53-375(C) and McGill's charged crime constituted a continuous course of conduct which could not be separated into individual charges. (Final Brief of Respondent at p.13 and pp. 17-20). First, the State's argument that McGill's actions constituted a continuous course of conduct was never argued or raised to the Trial Court, nor were there any findings by the Trial Court in this respect. Second, because the argument was not raised, McGill certainly could not be heard on it or respond to it at the Trial Court. Third, it is incorrect.

McGill's indictments only put him on notice for his actions on August 21, 2018, in Abbeville County, South Carolina. (R. pp. 1-4). McGill was charged with trafficking in methamphetamine 100 grams or more, but less than 200 grams; for bringing a quantity of methamphetamine and money to Angelina Williams' home at 260 Suttles Landing, Iva, South Carolina, which is located in Abbeville County. This happened as a result of a buy/bust operation being conducted by Abbeville County Sheriff's Office narcotic investigators out of Williams' home. Williams did not know McGill and neither did the Abbeville County Sheriff's Office. McGill lived in Anderson County and never would have come into Abbeville County but for Stewart Ferguson calling him as part of the buy/bust operation. Any other conduct that Ferguson may have testified to as to McGill did not occur in Abbeville County or on August 21, 2018, nor was it charged in the indictment, including that Ferguson on a weekly basis would drive to

Atlanta and pick up six pounds of methamphetamine and upon his return give McGill four pounds, who paid him for the drugs and delivery. (Final Brief of Respondent at p. 6) (R. pp. 133-137).

The State further argues, “If a statute sets forth alternative means or theories by which a crime may be committed, the indictment or information may charge one or all of the alternatives, provided the alternatives are not inconsistent with each other.” 41 Am. Jur. 2d Indictments and Informations § 202 (2020). (Final Brief of Respondent at p. 14). This is essentially what the Trial Court found in its Order related to the indictment in that ...The Indictment for the most part repeats the Trafficking statute which does state varied ways to accomplish the offense of Trafficking...(R. p. 6).

The Fourth Circuit Court of Appeals rejected this argument in *United States v. Furlow*, 928 F.3d 311, 313 (4th Cir. 2019), cert. granted, judgment vacated on other grounds, No. 19-7007, 2020 WL 2814768 (U.S. June 1, 2020), so holding in part....

Finally, *Furlow* argues that “[i]ndictments in South Carolina drug cases indicate that [section] 44-53-375 and similar South Carolina drug statutes are not divisible.” See Br. of Appellant 14. According to *Furlow*, state court indictments charging a violation of section 44-53-375(B) or other drug statutes consistently list all of the statutory alternatives, which demonstrates that the alternatives are means and not elements. See *United States v. Jones*, 914 F.3d 893, 901 n.8 (4th Cir. 2019) (explaining that “when a charging document reiterates all the terms of the state law, that is an indication that each alternative is only a possible means of commission” (alterations and internal quotation marks omitted)). Although *Furlow* identifies several state court indictments that list many of the alternatives specified in various South Carolina drug statutes, other state court indictments charging violations of those statutes are more specific. See, e.g., *Gill*, 584 S.E.2d at 434; *Carter*, 495 S.E.2d at 776-77.14 We are unpersuaded that the sloppy drafting of indictments on some occasions overrides the state courts’ clear indications that the alternatives specified in section 44-53-375(B) are distinct offenses. See *Mathis*, 136 S. Ct. at 2257 (explaining that sentencing court can take “peek” at record documents, such as indictment, when “state law fails to provide clear answers” on divisibility). *Furlow*, 928 F.3d at 321–22.

The Fourth Circuit observed that the Fifth Circuit had held that section 44-53-370(a) of the South Carolina Code is divisible. *Furlow*, 928 F.3d at 320. In footnote 11 of *Furlow*, the Fourth Circuit Court of Appeals stated, “Our ruling regarding the divisibility of section 44-53-375(B) is consistent with the decisions of our sister circuits assessing the divisibility of similar state drug offense statutes. See *United States v. Mohamed*, 920 F.3d 94, 101 (1st Cir. 2019) (concluding that Maine drug statute is divisible); *United States v. Martinez-Lopez*, 864 F.3d 1034, 1041-43 (9th Cir. 2017) (same for California drug statute); *United States v. Maldonado*, 864 F.3d 893, 898 (8th Cir. 2017) (same for Iowa and Nebraska drug statutes); *Flores-Larrazola v. Lynch*, 854 F.3d 732, 732 (5th Cir. 2017) (same for Arkansas drug statute); *Spaho v. United States Attorney Gen.*, 837 F.3d 1172, 1177-78 (11th Cir. 2016) (same for Florida drug statute). *Id.* At 320.

The same analysis would and does render the very similar Section 44-53-375(C) divisible. McGill’s Indictment is duplicitous in that it “join[s] in a single count ... two or more distinct and separate offenses” *Id.* This Court should reverse.

2. THE TRIAL COURT ERRED IN FAILING TO GRANT A CONTINUANCE TO ALLOW THE DEFENSE TO DO A COMPLETE REVIEW OF STEWART FERGUSON’S PHONE, WHICH IS COMPELLING, GIVEN THAT THE STATE DID NOT EVEN LOOK AT THE DATA, EXCEPT AT THE TIME OF TRIAL AND USED TEXT MESSAGES AGAINST APPELLANT

The State argues that trial counsel failed to state, with any particularity, what date he hoped to find on the phone which would benefit the defense. Further, trial counsel was allowed to review the phone during trial and was unable to locate any evidence which would contradict anything presented in the State’s case against Appellant. (Final Brief of Respondent at p. 24). To be clear, the reason McGill couldn’t state with any particularity what he hoped to find on the

phone was because he wasn't allowed the opportunity to have a meaningful review of that phone. The State did not look at Ferguson's phone until the day of trial and the DEA did not completely look through Ferguson's phone when they were looking at his contacts in a pending Federal drug conspiracy case. McGill got a couple of hours on the day of trial to get a limited look at the phone, all in the presence of law enforcement at the Abbeville County Courthouse that was limited in scope and time.

Most egregious is that the State used text messages from Ferguson's phone against McGill in its case-in-chief. (R. pp. 151-156), while holding the position that the information on the phone dump was not relevant, when they didn't even look at it. (R. pp. 61-62). (R. pp. 38-53, R. pp. 54-67). The DEA analyst performed a phone dump and retrieved conversations, text messages, images, and videos of methamphetamine and porn. (R. p. 467). There were 26,188 images of family members, methamphetamine and porn. (R. p. 467). This information was in the sole possession and control of the prosecution and was material to the preparation of McGill's defense. Particularly, as to the cross-examination of Ferguson and his credibility and bias in front of the jury. This is a compelling reason.

The Confrontation Clause provides "in all criminal prosecutions, the accused shall enjoy the right to ... be confronted with the witnesses against him." U.S. Const. amend. VI. The Confrontation Clause guarantees a defendant the opportunity to cross-examine a witness concerning bias. *State v. Clark*, 315 S.C. 478, 481, 445 S.E.2d 633, 634 (1994) (citing *State v. Brown*, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991)). A defendant demonstrates a Confrontation Clause violation when he is prohibited from "engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias ... from which jurors ... could

draw inferences relating to the reliability of the witness.” *State v. Stokes*, 381 S.C. 390, 401–02, 673 S.E.2d 434, 439 (2009) (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 680, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)) (alteration in original). *State v. Gracely*, 399 S.C. 363, 372, 731 S.E.2d 880, 885 (2012).

“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.” Rule 608(c), SCRE (emphasis added). “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)). *State v. McEachern*, 399 S.C. 125, 140–41, 731 S.E.2d 604, 611–12 (Ct. App. 2012).

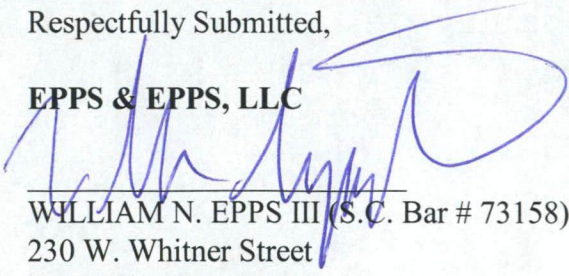
The State argues that even now-in this appeal-Appellant is unable to identify any data from the phone relevant to his defense or which would have justified a continuance. (Final Brief of Respondent at pp. 25-26). McGill is unable to identify any data from the phone relevant to his defense because he was wrongfully denied a meaningful review of the phone. The State cannot say otherwise because they didn’t look at Ferguson’s phone dump and don’t know themselves. The Trial Court erred in failing to grant a continuance.

CONCLUSION

For the reasons stated, this Court should reverse the conviction of Kenneth Earle McGill or reverse his convictions and remand the case for a new trial.

Respectfully Submitted,

EPPS & EPPS, LLC


WILLIAM N. EPPS III (S.C. Bar # 73158)

230 W. Whitner Street

Post Office Box 2167

Anderson, SC 29622-2167

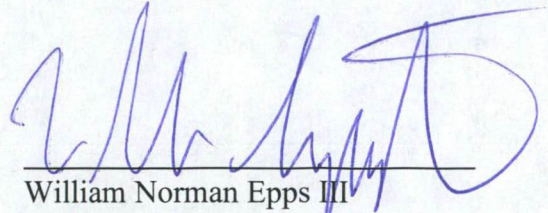
Telephone: (864) 224-2111

ATTORNEYS FOR APPELLANT

March 16, 2021

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Appellant's Final Reply Brief is in compliance with Rule 211(b) SCACR.



William Norman Epps III
Post Office Box 2167
Anderson, South Carolina 29622
(864) 224-2111
Attorney for Appellant

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