STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Kristi F. Curtis, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRANDON CHRISTOPHER GRAYER,

APPELLANT.

APPELLATE CASE NO. 2020-000556

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Where the State's case rested primarily on the testimony of two testifying co-defendants, did the trial court err in refusing to allow appellant to cross-examine these witnesses on the potential sentences, including mandatory minimum sentences, they faced for murder charges?

STATEMENT OF THE CASE

A Charleston County grand jury indicted appellant for murder, attempted murder, first-degree burglary, kidnapping, and a weapons charge. R. 587. On March 9-12, 2020, appellant was tried before the Honorable Kristi F. Curtis and a jury. R. 1. Anne Williams and Jordan Smith represented the State. R. 1. Chad Shelton and Joseph Kaiser represented appellant. R. 1. The jury acquitted appellant of burglary and kidnapping. R. 578, l. 12 – 579, l. 10. The jury convicted appellant of murder, attempted murder, and the weapons charge. R. 578, l. 12 – 579, l. 10. Judge Curtis sentenced appellant to concurrent terms of thirty years' imprisonment for murder and fifteen years' imprisonment for attempted murder and a consecutive five-year term of imprisonment for the weapons conviction. R. 586, l. 13 – 20. This appeal follows.

STANDARD OF REVIEW

The standard of review is abuse of discretion. See State v. Pradubsri, 403 S.C. 270, 276, 743 S.E.2d 98, 101 (Ct. App. 2013) (reversing the trial judge's refusal to allow cross-examination regarding mandatory minimum sentences witness avoided to show bias). "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. Mizzell, 349 S.C. 326, 331, 563 S.E.2d 315, 317 (2002).

ARGUMENT

Where the State's case rested primarily on the testimony of two testifying co-defendants, the trial court erred in refusing to allow appellant to cross-examine these witnesses on the potential sentences, including mandatory minimum sentences, they faced for murder charges.

Antoine "Fat Boi" Gill ("Gill") and Maurice "Crumb" Washington faced the same murder charge as appellant and testified against him. The State inexplicably objected to cross-examination by appellant on the sentencing exposure each faced despite clear black-letter law that such cross-examination is allowed. R. 237, l. 6 – 19. R. 292, l. 15 – 22. State v. Gracely, 399 S.C. 363, 731 S.E.2d 880 (2012). The trial court sustained both of the State's objections and these errors require reversal in this closely contested case in which the jury acquitted appellant of kidnapping and burglary. R. 578, l. 12 – 579, l. 10.

Late on the night of September 23, 2016, Ivan Greene died as the unintended victim of a shootout from which the police collected over seventy (70) shell casings and projectiles. R. 45, l. 20 – 46, l. 4. R. 140, l. 10 – 25. The State claimed the intended victim was Marquise Bryant ("Bryant") in retaliation for shooting appellant earlier in the day. R. 18, l. 5 – 23. Bryant was not injured in the shootout and even though he was the alleged victim in the attempted murder charge against appellant, did not testify in this case.

At about 1:30 PM on the day Greene died, the police responded to a shooting call. R. 29, l. 3 – 30, l. 1. Appellant had been shot. R. 30, l. 2 – 3. The officer saw appellant bleeding from a head wound and a bloodstain on his shoulder. R. 30, l. 4 – 12. Appellant had a bullet protruding from his chest. R. 30, l. 4 – 12. EMS took appellant to the hospital. R. 31, l. 11 – 15.

David Weiters described the fish fry and crab bake where Greene was killed in the shootout. R. 80, l. 4 – 86, l. 17. Hassell Street was a dead-end street. R. 80, l. 4 – 86, l. 17.

Weiters saw a Lincoln Navigator. R. 80, l. 4 – 86, l. 17. When the Navigator pulled up, gunfire began. R. 80, l. 4 – 86, l. 17. Weiters and Greene tried to get out of the way, but Greene was shot. R. 80, l. 4 – 86, l. 17. Weiters continued to hear gunshots after Greene fell. R. 80, l. 4 – 86, l. 17. Another witness saw the Navigator try to escape, but it ran into a light pole and blew out the transformer for the neighborhood. R. 74, l. 2 – 10. The witness then saw more than one person run through her yard. R. 74, l. 2 – 18.

Pinero Gambrell ("Gambrell"), who lived close to the shootout location on Hassell Avenue, was getting ready for bed when he heard knocking on the door from people who sounded like they were in distress. R. 251, l. 7 – 255, l. 25. He opened the door and three men burst in. R. 251, l. 7 – 255, l. 25. The men hid and took his phone. R. 251, l. 7 – 255, l. 25. Gambrell heard the police nearby, but the men made him stay quiet. R. 251, l. 7 – 255, l. 25. The men used Gambrell's phone to call someone and a friend picked them up. R. 251, l. 7 – 255, l. 25. The men left Gambrell's phone behind, as well as some bloody clothing, which the police collected. R. 117, l. 14 – 22. R. 405, l. 4 – 15.

The police found two guns, two cell phones, and receipts in the abandoned Navigator. R. 107, l. 4 – 13. R. 123, l. 10 – 124, l. 4. They took fingerprints from the Navigator. R. 119, l. 14 – 19. The State's fingerprint examiner matched the prints from the car to Randall Myers, Maurice Washington, and Christopher Smith. R. 161, l. 9 – 20, l. 11. Of the multiple prints they examined, the police matched one, on the car's left rear exterior passenger window, to appellant. R. 166, l. 6 – 16.

SLED performed DNA analysis on the guns and the clothing. R. 323, l. 16 – 345, l. 21. The DNA found on the guns was touch DNA. R. 360, l. 6 – 8. On one of the guns, the police found a mixture of the DNA of at least three people. R. 326, l. 10 – 329, l. 2. The SLED expert

opined that appellant and Randall Myers were likely part of this mixture. R. 326, l. 10 – 329, l. 2. On cross-examination, counsel explored the concept of "stutter" DNA because on one of the loci, the allele was inconsistent with appellant's DNA. R. 350, l. 22 – 358, l. 10. The expert said that sometimes the body incompletely copies DNA. R. 350, l. 22 – 358, l. 10. This incomplete copy causes two allele numbers to show up in a DNA teste even though only one person contributes DNA. R. 350, l. 22 – 358, l. 10. The expert explained the DNA that was inconsistent with appellant's DNA as "stutter" because it fell within SLED's statistical parameters. R. 350, l. 22 – 358, l. 10. If the statistics were run with four contributors instead of just three, the expert admitted that "possibly" other co-defendants Washington, Gill, and Nathan Burnett also might be included on the gun. R. 350, l. 22 – 358, l. 10. The DNA expert also conceded that touch DNA can be transferred to an object someone never touched. R. 362, l. 8 – 364, l. 11. People shed DNA in different amounts and no testing was done to see how much any of the people involved shed DNA. R. 364, l. 15 – 365, l. 4. Randall Myers and Maurice Washington's DNA were found on the items recovered from Gambrell's trailer. R. 337, l. 17 – 343, l. 21.

Other than the two pieces of physical evidence described above—the DNA and the fingerprint—the State's case rested on the testimony of Gill and Washington. Gill admitted to lying to police multiple times. R. 223, l. 19 – 21. Washington admitted lying to police multiple times. R. 293, l. 20 – 306, l. 12. Gill admitted he was testifying to help himself. R. 186, l. 14 – 15. Washington also admitted he was testifying to help himself. R. 290, l. 18 – 25.

Gill said he saw appellant after he got out of the hospital from being shot. R. 189, l. 3 – 16. Appellant's arm was in a sling. R. 190, l. 5 – 10. According to Gill, appellant said Marquise shot at him and was driving a red Nissan Altima. R. 190, l. 17 – 25. The men knew that Bryant hung out on Hassell Avenue. R. 194, l. 9 – 12. The other men present—that Gill could recall—

were Vinson Robinson, Nathan Burnett, appellant, equivocally "Omar," and perhaps someone else. R. 195, l. 2 – 15.

Gill left and went back over to the group around 8:00 or 9:00 PM. R. 197, l. 2. Either Omar or Randall "Thugga" Myers called Gill. R. 197, l. 2 – 7. A Lincoln Navigator was parked in front of the house. R. 198, l. 17 – 19. Vinson Robinson, Randall Myers, appellant, Maurice Washington, Nathan Burnett, and Omar Rivers were there. R. 197, l. 14 – 24. Gill and Rivers got into a fight. R. 198, l. 6 – 17.

The men decide to go looking for Bryant and shoot him. R. 204, l. 1 – 9. Gill, Myers, appellant, and Burnett got into the Navigator. R. 198, l. 22 – 199, l. 6. Vinson Robinson and Washington get into a pickup truck and followed them. R. 199, l. 12 – 17. R. 201, l. 5 – 11. Gill drove. R. 200, l. 10 – 11. Everyone had a gun except for Gill. R. 201, l. 18 – 23. Gill said he didn't take a gun because he "wasn't expecting everything to go like it went." R. 201, l. 21 – 24.

Gill had been doing drugs all day and was still intoxicated. R. 207, l. 14 – 18. Everyone else was "somewhat" intoxicated. R. 207, l. 19 – 20. They drove down the dead-end street and when they saw the red Nissan, Myers opened fire. R. 209, l. 4 – 13. The other two men in the car also started shooting. R. 209, l. 14 – 16.

Gill agreed that they "got a little more than [they] bargained for down that street" because the people at the crab bake started shooting back. R. 209, l. 22 – 210, l. 6. Gill had to back out because of the dead-end street. R. 210, l. 14 – 22. He hit the truck behind him, then hit the light pole and the car died. R. 183, l. 23 – 211, l. 18. During the gun battle, Burnett accidentally shot Myers in the back of the head, grazing him. R. 212, l. 5 – 24. Gill got out of the car and ran to

the next street. R. 211, l. 19 – 25. He did not know where the other men went, but Myers called him and Gill picked them up from Gambrell's trailer. R. 212, l. 1 – 215, l. 13.

Washington similarly testified about the plan to shoot Bryant, but with a critical difference. R. 272, l. 13 – 277, l. 21. In Washington's plan, because Hassel Avenue was a one-way street, the men would leave their cars and jump a fence to commence their attack. R. 277, l. 5 – 278, l. 4. As defense counsel adroitly pointed out in his closing, this slip from Washington was critical to proving that appellant did not participate in the shooting. R. 531, l. 8 – 19. As counsel argued, it made no sense to have a plan to jump a fence when appellant's arm was still in a sling from being shot earlier in the day. R. 531, l. 8 – 19. Also different was that Washington claimed he picked up the men from Gambrell's trailer instead of Gill. R. 285, l. 3 – 12.

When defense counsel cross-examined Gill, he confirmed that Gill was charged with murder and facing life without parole. R. 237, l. 6 – 9. Counsel then began asking, "Minimum 30—" and the solicitor objected. R. 237, l. 10 – 12. Judge Curtis sustained the objection. R. 237, l. 13.

When defense counsel cross-examined Washington, he asked, "Do you know what the penalty is for murder?" R. 292, l. 20. Again, the solicitor objected and the court sustained the objection. R. 292, l. 21 – 22.

The trial court erred in sustaining the State's objections. The jury never heard that Gill and Washington faced a mandatory minimum sentence of thirty years for murder. S.C. Code Ann. § 16-3-20(A). The trial court erred in preventing appellant from impeaching Gill and Washington with the penalties they faced as evidence of their bias and motive to testify against appellant. State v. Gracely, 399 S.C. 363, 731 S.E.2d 880 (2012). Rule 608(c) allows a

defendant to cross-examine a witness for "[b]ias, prejudice or any motive to misrepresent." Rule 608(c), SCRE.

In Gracely, the State's witnesses faced significant mandatory minimum sentences. Gracely at 373-74, 731 S.E.2d at 885-86. The trial judge "improperly prevented questioning which would have examined the extent of that bias and the witnesses' possible motivations for testifying against Appellant." Id. "The fact that a cooperating witness avoided a *mandatory minimum* sentence is critical information that a defendant must be allowed to present to the jury. Id. at 374-75, 731 S.E.2d at 886 (emphasis in original). See also State v. Brown, 303 S.C. 169, 399 S.E.2d 593 (1991). The Gracely Court held the error could not be harmless because of the "abysmal credibility" of the State's witnesses and cited the "heavy reliance on circumstantial evidence." Gracely at 375, 731 S.E.2d at 886.

The errors in appellant's case is even worse than the error in Gracely. The Gracely Court found reversible error even though the defendant was able to impart some knowledge about the witnesses' potential sentences to the jury. Here, appellant was prevented from cross-examining two witnesses, not just one. The State successfully prevented Appellant from conducting any cross-examination of Washington about sentencing. The jury therefore was prevented from learning the extent of Gill and Washington's motivation to lie and to please the solicitors and police officers prosecuting him.

This Court reversed a conviction soon after Gracely because the trial judge refused to allow specific questioning regarding the potential sentence a witness faced. State v. Pradubsri, 403 S.C. 270, 743 S.E.2d 98 (Ct. App. 2013). The trial judge in Pradubsri only allowed the defendant to ask whether the witness faced "a substantial amount of time." Id. at 275, 743 at 101. Citing the principle that a defendant has the right to cross-examine on any fact "which

tends to show interest, bias, or partiality of the witness," the Court held the limitation on the defendant's questions was error. Id. at 276-80, 731 S.E.2d at 102-04. The Pradubsri Court stated this evidence regarding potential legal exposure was "critical" to showing the witness's "potential bias." Id. at 104, 743 S.E.2d at 280. See also State v. Mizzell, 349 S.C. 326, 334-35, 563 S.E.2d 315, 319 (2002) (reversing despite trial court allowing defendant to ask whether witness could go to jail for a "long time").

In this Court's recent decision in State v. Williams, ___ S.C. ___, 854 S.E.2d 166, 170 (Ct. App. 2021), a trial judge erred in preventing cross-examination about sentencing exposure. Because the error in this case is clear, appellant expects the State to rely on Williams to claim the error here is harmless. In Williams, two witnesses identified the defendant as the shooter, but the court only improperly limited cross-examination of one of them. Williams, 854 S.E.2d at 170-71. The state in Williams had independent testimony regarding the strained relationship between the defendant and the victim. Id.

Unlike Williams, Washington and Gill were the primary sources of the State's evidence. Appellant's fingerprint on the Navigator could have been left at any time during the day. Appellant's DNA on the gun was only touch DNA and could have been transferred by one of the (at least) other two people whose DNA was present on the gun. The court's error prejudiced appellant and cannot be harmless in this close case. The jury did not believe that appellant took part in the burglary and kidnapping at Gambrell's trailer and acquitted him of those charges. Had they heard that Gill and Washington avoided thirty-year mandatory minimum sentences, they likely would have acquitted appellant of all charges. This Court should reverse.

CONCLUSION

For the foregoing reasons, appellant's convictions should be reversed and this case remanded for a new trial.

Respectfully Submitted,

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This 23rd day of September, 2021.

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CERTIFICATE OF COUNSEL

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."

Respectfully Submitted,

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This 23rd day of September, 2021.