

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Greenwood County
The Honorable Eugene C. Griffith, Jr., Circuit Court Judge
Appellate Case Tracking Number 2018-001289

The State,

Appellant,

v.

Corey Brown,

Respondent

FINAL BRIEF OF APPELLANT

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- I. The circuit court erred in granting Respondent a new trial. There is no evidence in the record to support the court's conclusion the State made an offer to Respondent in exchange for his testimony. The co-defendant's belief he could obtain a better deal if he testified is insufficient to constitute evidence the State had to turn over.
- II. To the extent the circuit court's ruling can be read to have granted the new trial on the remaining grounds raised in the motion for a new trial, the court failed to make proper findings of fact and none of the issues raised warranted a new trial.

STATEMENT OF THE CASE

Respondent was indicted on charges of armed robbery, kidnapping, conspiracy to commit armed robbery/kidnapping, and conspiracy to commit grand larceny. The jury found him not guilty on the conspiracy to commit armed robbery/kidnapping. The jury convicted him of armed robbery, kidnapping, and conspiracy to commit grand larceny. The judge sentenced Respondent to a total of twenty-five years in prison. On August 25, 2014, Respondent filed a Motion for New Trial. The circuit court granted the motion by Order Granting New Trial filed June 1, 2018. The State received written notice of the Order on June 28, 2018 and filed a timely Notice of Appeal on June 9, 2018. This brief follows.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only and is bound by the trial court's factual findings unless they are clearly erroneous. State v. Wilson, 345 S.C. 1, 5–6, 545 S.E.2d 827, 829 (2001). “A trial judge has the discretion to grant or deny a motion for a new trial, and his decision will not be reversed absent a clear abuse of discretion.” State v. Johnson, 376 S.C. 8, 11, 654 S.E.2d 835, 836 (2007). “An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support.” State v. Irick, 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001).

ARGUMENT

- I. **The circuit court erred in granting Respondent a new trial. There is no evidence in the record to support the court's conclusion the State made an offer to Respondent in exchange for his testimony. The co-defendant's belief he could obtain a better deal if he testified is insufficient to constitute evidence the State had to turn over.**

The circuit court erred in granting a new trial when there is no evidence in the record supporting the conclusion the State had reached a deal with Respondent's testifying co-defendants. The only evidence in the record was a plea offer was extended to one of the co-defendants and he turned it down. The only other evidence presented showed the co-defendant hoped to obtain a favorable sentence and have charges dropped, but never indicated an actual deal was reached with the Solicitor's Office. As a result, the circuit court abused its discretion in granting the new trial and this Court should reinstate Respondent's convictions and sentences.

The trial court's order grants a new trial primarily based on the State's alleged failure to disclose a plea offer and negotiations to the defense. The trial court found two disclosures should have been made: 1) the initial offer of thirteen years to Evans, which was rejected by Evans; and 2) "the discussions the solicitor had with Evans and his attorney" leading to Evan's belief "if he testified, the State would present him a more favorable offer allowing him to plead guilty to a non-violent offense instead of to his original violent offenses." While not explaining the basis for its ruling, the trial court appears to be relying on analysis similar to that of Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and Giglio v. United States, 405 U.S. 150, 153, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972).

Thus, an individual asserting a Brady violation must demonstrate the evidence was (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) suppressed by

the State; and (4) material to the accused's guilt or innocence, or was impeaching. Kyles v. Whitley, 514 U.S. 419, 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); State v. Kennerly, 331 S.C. 442, 453, 503 S.E.2d 214, 220 (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.” (alteration by court) (quoting United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)) (internal quotation marks omitted)); see also, State v. Anderson, 407 S.C. 278, 287, 754 S.E.2d 905, 909 (Ct. App. 2014).

It is well established that an express agreement between the prosecution and a witness is possible impeachment material that must be turned over under Brady. See Giglio, 405 U.S. at 154–55. In Giglio, the Supreme Court held that “evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it.” Id. at 155. The existence of a less formal, unwritten or tacit agreement may also be subject to Brady’s disclosure mandate. See e.g., Wisehart v. Davis, 408 F.3d 321, 323–24 (7th Cir. 2005). “But not everything said to a witness or to his lawyer must be disclosed. . . . Some promises, agreements, or understandings do not need to be disclosed, because they are too ambiguous, or too loose or are of too marginal a benefit to the witness to count.” Tarver v. Hopper, 169 F.3d 710, 717 (11th Cir. 1999).

The Fifth Circuit Court of Appeals acknowledged there is no “Supreme Court decision holding that the subjective beliefs of the witnesses regarding the possibility of future favorable treatment are sufficient to trigger the State’s duty to disclose under Brady[] and Giglio” Hill v. Johnson, 210 F.3d 481, 486 (5th Cir. 2000). A defendant’s “general and hopeful expectation of leniency is not enough to create an agreement or an understanding.” Collier v.

Davis, 301 F.3d 843, 849 (7th Cir. 2002); see also, Hudson v. State, 277 Ga. 581, 586(5), 591 S.E.2d 807 (2004) (“That [the witness] may have expected help for his cooperation does not establish that a deal or agreement was made between him and the State.” (Citation omitted.)). Further, “[t]he [Giglio] rule does not address nor require the disclosure of all factors which may motivate a witness to cooperate. The simple belief by a defense attorney that his client may be in a better position to negotiate a reduced penalty should he testify against a codefendant is not an agreement within the purview of Giglio.” Alderman v. Zant, 22 F.3d 1541, 1555 (11th Cir.1994). “The government is free to reward witnesses for their cooperation with favorable treatment in pending criminal cases without disclosing to the defendant its intention to do so, provided that it does not promise anything to the witnesses prior to their testimony.” Shabazz v. Artuz, 336 F.3d 154, 165 (2d Cir. 2003). Additionally, “Giglio does not require disclosure of rejected plea offers; the duty to disclose is dependent upon the existence of an agreement between the witness and the government.” United States v. Rushing, 388 F.3d 1153, 1158 (8th Cir. 2004).

The first alleged Brady and Giglio violation was on the basis of the State failing to disclose the rejected plea offer. As the Eighth Circuit Court of Appeals explained, there is no requirement to disclose a rejected plea offer. Logically, there would be no reason to disclose a plea offer which the witness rejected. The reason Giglio requires disclosure is because the witness is receiving something in exchange for their testimony and the defendant is allowed to confront the witness on that possible bias or motive to lie. See e.g., Giglio, 405 U.S. at 154. “When the ‘reliability of a given witness may well be determinative of guilt or innocence,’ nondisclosure of evidence affecting credibility falls within this general rule [of Brady].”); State v. Gracely, 399 S.C. 363, 731 S.E.2d 880 (2012) (finding the avoidance of a mandatory minimum as a result of providing cooperating testimony is “critical information that a defendant

must be allowed to present to the jury.”). In a situation in which the witness specifically declines the alleged reward from the State, it is impossible to allege he is testifying on the basis of an agreement that is not in effect. Accordingly, the trial court committed an error of law in finding the State had a duty to disclose the rejected plea offer to one of Respondent’s co-defendants.¹

The second ground for granting the new trial was the failure to disclose alleged discussions between the State, Evans, and Evans’ counsel. The trial court does not find the discussions resulted in any type of agreement or understanding. Instead, he merely finds the discussions lead to a belief by Evans that he would receive favorable treatment in exchange for his testimony. Significantly, during the motion hearing, counsel for Respondent specifically acknowledged there is no evidence the State told Evans what to expect in return for testifying. She stated:

And on some of the these recordings -- and, again, you know, **this is Mr. Evans’s perception, I’m not suggesting that Mr. Taylor or Ms. White told him this**, but in one of the recording he says ten years is the worst I’m looking at, it’s nonviolent. Thirteen was my first offer, but then I cut a deal and -- if I cut a deal, I get nonviolent. You know, that’s in several of the different recordings.

(10/6T. 18; R. 507) (emphasis added). The trial court interjects: “And that may be conversations that his lawyer is saying if you testify, maybe I can get you nine, and that doesn’t involve the State.” Counsel for Respondent the admitted: “Exactly, and that’s -- exactly. And that’s why I say I’m not saying that that’s -- I’m just telling the Court what information I heard on the recordings.” (10/6T. 18; R. 507).² The trial court never finds an agreement, explicit or implicit,

¹ It should also be noted that the 13 year plea agreement which the State did not disclose contained no provision regarding the testimony of Evans against Respondent. It was merely a plea offer to avoid trial and not one contingent upon his testimony. (10/6T. 4; R. 493).

² The audio recordings demonstrate exactly what Respondent’s counsel indicated, Evans had a belief he would be obtaining a better sentence but there was no promise made and no agreement in place in exchange for his testimony. The audio recordings were not made an exhibit but were clearly before the trial court for consideration in making its ruling. (10/6T. 8; R. 497). Additionally, the court referenced the recordings in its ruling: (Order for New Trial p.2; R. 527).

existed between the State and Evans which exchanged his testimony for lighter charges and sentencing. Instead, he found merely "discussions" had occurred which lead to Evans' belief he would receive lighter sentence and charges. (Order for New Trial, p.2; R. 527). These possible discussions, or Evans' beliefs about what he might receive or a benefit he might get by testifying, are clearly insufficient to require disclosure under either Brady or Giglio. Accordingly, the trial court erred in finding a new trial warranted under these circumstances.

To the extent the trial court's Order granting a new trial is based on allegedly false testimony by Evans', nothing in the record supports the conclusion Evans testified falsely. At Respondent's trial, Evans was asked whether he had been promised any deals to testify. He indicated he did not have a deal to testify. (T.218; R. 231). This was an entirely honest response.

Even if one considered the rejected plea offer a deal, it was not contingent in any way on Evans providing testimony against Respondent. Further, while it is clear from the record that Evans hoped and believed he would receive a beneficial sentence as a result of his cooperation, there was no deal or promise in exchange for his testimony. As a result, there is simply no evidence in the record to support a conclusion that Evans presented false testimony by indicating he did not have a deal in exchange for his testimony.

Accordingly, the trial court abused its discretion in granting a new trial based on the State's failure to turn over evidence of a rejected plea offer, discussions with Respondent, and the Respondent's belief he would receive a benefit for testifying. None of these are required to be disclosed under existing case law. Further, there are simply no facts in the record to support the trial court's conclusions regarding the need for a new trial or the basis of a new trial.

Finally, any improperly suppressed evidence was not material because Evans' testimony was not the sole testimony linking Respondent to the crimes. Testimony by both the victim and

another co-defendant placed Respondent as one of the four who were directly involved in the armed robbery and kidnapping. (T. 137-139; 145-146; R.150-152; 158-159). Even if the testimony would have been impeaching and should have been disclosed, it would not reasonably have impacted the outcome of the trial because of the other testimony in the record.

Accordingly, this Court should find the trial court abused its discretion in granting a new trial. First, the trial court committed an error of law in finding a rejected plea offer and discussions had to be turned over. Second, there is no evidence in the record to support the conclusion any deal or other understanding had been reached which should have been turned over. Finally, even if the information should have been turned over, it was not material in light of the other evidence in the record directly connecting Respondent to the crime.³

³ To the extent the Order can be read to address co-defendant Nicholson, there was no discussion at the hearing nor any evidence presented indicating a deal existed in exchange for Nicholson's testimony. The only evidence presented was his ultimate charges and sentence. Without more, there is no evidence in the record to support the trial court's decision and the grant of a new trial, if on this basis, was an abuse of discretion. See Bell v. Bell, 512 F.3d 223, 247 (6th Cir. 2008) (finding where no agreement existed favorable treatment need not be disclosed).

II. To the extent the circuit court's ruling can be read to have granted the new trial on the remaining grounds raised in the motion for a new trial, the court failed to make proper findings of fact and none of the issues raised warranted a new trial.

The trial court's ruling could be construed to include a grant of a new trial on several additional grounds originally raised in Respondent's motion for a new trial. None of the grounds raised support a grant of a new trial. Therefore, this Court should find the trial court erred in granting a new trial.

In his Motion for New Trial, Respondent maintained several additional grounds for a grant of a new trial. He maintained, in addition to the claims related to deals being offered to co-defendants which were not disclosed, the trial court should order a new trial because 1) he did not have a pretrial Neil v. Biggers⁴ hearing regarding co-defendant Nicholson selecting Respondent's picture off of a mugshots page; 2) violation of Brady and Rule 5 for failing to provide information about Nicholson's identification of Respondent from mugshots.com; 3) the trial court allowed the victim to identify Respondent in trial even though pre-trial he had excluded the identification; 4) trial court allowed a joint trial with a co-defendant; and 5) the jury heard testimony regarding Respondent's arrest in Georgia.

The trial court's Order states:

Mr. Brown also argued he should be granted a new trial because there was no pretrial *Neil v. Biggers* hearing, additional material evidence was withheld, there was improper witness identification during trial, and the jury heard improper testimony about Mr. Brown's criminal history.

The Court grants Mr. Brown's motion for a new trial based on the foregoing and the evidence and arguments presented in the motion for a new trial and subsequent hearing.

⁴ Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed. 2d 401 (1972).

(Order for New Trial p.3; R. 528).⁵ If the trial court's determination is on the basis of any of the above grounds alleged, this Court should remand to the trial court for the court to make actual fact findings and to conduct proper analysis. Without knowing the specific grounds for the grant of the new trial as it relates to each of these issues, the State will address the merits of each of the additional claims to the best of its ability below.

Neil v. Biggers

Respondent maintained the trial court erred in failing to have a pre-trial Neil v. Biggers hearing regarding co-defendant Nicholson's identification of Respondent on the mugshots.com website. A hearing is required when a defendant challenges the admissibility of a witness's identification. See State v. Wyatt, 421 S.C. 306, 310, 806 S.E.2d 708, 710 (2017) (citing Biggers, 409 U.S. at 198-200). Most significantly, however, the parties and trial court had significant discussions during trial once this information arose. Counsel for Respondent made several motions, including a motion for mistrial, which were denied. The trial court specifically offered to allow additional questioning of Nicholson to satisfy Respondent's request for a Neil v. Biggers hearing. After discussion, and a meeting with law enforcement involved in the determination of Respondent's real name, the court specifically asked if Respondent wanted to call Nicholson or needed to have him testify regarding the use of the website. Respondent's counsel waived the offer by the trial court indicating "I think the information from Officer Lewis is sufficient." (T. 349; R. 362).

Counsel was specifically offered the ability to question law enforcement and Nicholson regarding the procedure used for the determination of Respondent's real name. Counsel specifically rejected the offer to track down and question Nicholson indicating it was not

⁵ Initially, the trial court made no factual findings or reached any conclusions of law specifically addressing any of the above grounds for a new trial or its reasons for granting a new trial.

necessary. (T.344-349; R.357-362). As a result, the trial court abused his discretion in granting a new trial on this ground because Respondent was given the opportunity to specifically question Nicholson in what would amount to a Neil v. Biggers hearing and specifically declined.⁶

Further, there is no doubt that a Neil v. Biggers hearing would have resulted in the admission of the identification. First, Nicholson was shown a website with numerous photos, with the only identifying information being the person's real name—which he did not know for Respondent. (T.296; 299; R.309; 312). Out of the many photos, making it much less suggestive than even a normal lineup, he picked out Respondent. Additionally, he spent 4-5 hours with Respondent in a vehicle and throughout the day. Certainly even if the identification could have been unnecessarily suggestive, under the totality of the circumstances there was no substantial likelihood of misidentification. See Biggers, 409 U.S. at 198-99 (setting forth a two-part inquiry to determine the admissibility of an out-of-court identification: first, a court must determine whether the identification process was unduly suggestive; next, it must determine whether the identification, under the totality of the circumstances, was nevertheless reliable such that there was no substantial likelihood of misidentification); Manson v. Brathwaite, 432 U.S. 98, 114 (1977) (factors to consider in the totality of the circumstances analysis include “opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation.”). Accordingly, even if the trial court concluded the identification using mugshots.com was unnecessarily suggestive, the court erred in finding a new trial was proper because there is no evidence to suggest that the identification was not otherwise reliable.

⁶ While a Neil v. Biggers hearing usually occurs pre-trial, there is no requirement that it occur pre-trial. As a result, a hearing immediately upon learning of the photo identification would have been sufficient had Respondent's counsel taken the court up on its offer.

Mugshots.com

Respondent next contends the State failed to disclose evidence regarding the use of mugshots.com and the picture selected from mugshots.com prior to trial. Initially, it should be noted the State did explain the process used to Respondent's counsel. Also, all information was turned over during trial in plenty of time to be used by Respondent. Finally, as discussed above, the picture was relevant to a determination of whether the identification by Nicholson was reliable and Respondent specifically waived any Neil v. Biggers hearing.

In Brady, the United States Supreme Court held "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady, 373 U.S. at 87. The South Carolina Supreme Court has found: "A Brady claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment." Sheppard v. State, 357 S.C. 646, 659, 594 S.E.2d 462, 470 (2004).

"In determining the materiality of nondisclosed evidence, this Court will consider it in the context of the entire record." State v. Gathers, 295 S.C. 476, 481, 369 S.E.2d 140, 143 (1988). "[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); State v. Kennerly, 331 S.C. 442, 453, 503 S.E.2d 214, 220 (Ct. App. 1998). This Court in Kennerly further explained: "In a Brady analysis, information is not deemed 'material' if the defense discovers the information in time to adequately use it at

trial.” Kennerly, 331 S.C. at 453, 503 S.E.2d at 220; see also, State v. Moses, 390 S.C. 502, 517, 702 S.E.2d 395, 403 (Ct. App. 2010) (“Evidence is not considered ‘material’ if the defense discovers the information in time to adequately use it at trial.”). Further, “[t]he lack of demand . . . [of a continuance] is often taken as strong evidence that the discovery violation has not been prejudicial.” 5 Wayne R. LaFave, et. al, Criminal Procedure § 20.6(b) (3d. ed. 2010); see also, Gorham v. Wainwright, 588 F.2d 178 (5th Cir.1979) (denying the defendant’s mistrial motion and holding the defendant was not prejudiced by the prosecution’s failure to turn over certain reports prior to trial because, although defense counsel requested and received a ten minute recess to review the new evidence, he did not request a continuance); State v. Davis, 309 S.C. 56, 419 S.E.2d 820 (Ct. App. 1992) (the trial court’s failure to suppress evidence of a defendant’s oral statements because the prosecution did not disclose the statements pursuant to Rule 5, SCRCrimP, despite a timely request for them upheld where the defendant was permitted to view and copy the prosecution’s file and did not request a continuance or recess to review the prosecution’s file).

During the discussion relevant to the mugshots.com identification of Respondent by Nicholson, the State argued Detective Brooks had communicated with Respondent’s counsel regarding the means of identifying Respondent’s real name and creating the actual lineup which was used by Evans to pick out Respondent. (T.322-323; R.335-336). Additionally, the State indicated they had nothing in their file “other than the picture that was provided to [Respondent’s counsel] that says mugshots.com.” (T.326-327; R.339-340). Respondent’s counsel indicated she was provided information about Respondent’s arrest in Georgia as well as provided the picture generated as a result of the conversation between Nicholson and Detective Lewis looking at mugshots.com. (T.336-337; R.349-350).

Additionally, the information was not material in that there is no reasonable probability that, had the evidence been disclosed to the defense (more than it already was by the State), the result of the proceeding would have been different. Additionally, Respondent received the information in during the proceeding and had time to use the information. As discussed above, Respondent was able to talk with the detective involved and decided not to pursue the issue any further. It is hard to comprehend how the mugshots.com information was material if Respondent's counsel chose not to act on it when given the opportunity by the Court. Accordingly, if this argument formed a basis for the grant of the new trial, the trial court abused its discretion.

Victim's Identification

The trial court abused its discretion to the extent it granted a new trial based on the victim's identification of Respondent at trial. Respondent specifically opened the door to the introduction of the testimony indicating the victim was able to actually identify Respondent.

During her cross-examination of the victim, Respondent's counsel asked:

- Q. Okay. A couple of more questions about Mr. Brown. At one point you were shown a lineup that included a picture of Mr. Brown. Were you able to pick him out as one who was involved in this crime?
- A. No, ma'am.
- Q. And you're not able to identify him in the courtroom, are you?
- A. Now, I do.
- Q. But you don't know that that's, but you can't identify him as one who was, is that correct?
- A. Say that again?

(T.137-138; R.150-151). Counsel for Respondent then immediately changed the subject of her questioning to which door the victim indicated he got out of a the convenience station where the kidnapping ended. (T.138; R. 151).

The State, on re-direct, followed up on Respondent's questioning:

- Q. I just want to, you didn't really get a chance to answer. Ms. Merrill asked you, you couldn't have said, you couldn't identify the person that was in the car that night in the courtroom, could you? Can you identify anybody in the courtroom today that was in the car that night?
- A. Now, I can.
- Q. Who is it?
- A. It's Corey Brown.
- Q. Can you point him out?
- A. The guy in the brown shirt.
- Q. What was he doing in the car?
- A. He was driving.

(T.138-139; R.151-152). Counsel for Respondent clearly opened the door to the State's testimony. She specifically asked about his ability to identify someone in the courtroom and then changed the subject before the victim was able to explain. (T.142-143; R.155-156). The State had a right to follow-up on Respondent's questioning. See State v. Robinson, 305 S.C. 469, 474, 409 S.E. 2d 404, 408 (1991) ("[Because] appellant opened the door to this evidence, he cannot complain of prejudice from its admission."); State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981) (appellant cannot complain of prejudice from admission of evidence if he opened the door to its admission); State v. Beam, 336 S.C. 45, 52-53, 518 S.E.2d 297, 301 (Ct. App. 1999) (stating an appellant cannot complain of prejudice resulting from admission of evidence to which he opened the door).. Accordingly, the trial court clearly abused his discretion to the extent he granted the motion for a new trial based on this identification.

Joint Trial

The trial court clearly erred in granting a new trial, to the extent he did, based on the argument it was error to hold a joint trial with Respondent and a co-defendant. Respondent asserted being tried jointly with Johnson, who was tried in his absence, prejudiced Respondent.

Tellingly, Respondent never moved to sever the trials or complained about being tried jointly with Johnson, even after Johnson failed to show. Most tellingly, in his motion, he acknowledges: "Mr. Brown's counsel erred in not making a motion to sever his trial from Codefendant Johnson, particularly in light of Codefendant Johnson's failure to appear for trial." This is a matter that is appropriate for a PCR-hearing, but not for a motion to grant a new trial. An issue cannot be raised for the first time in a motion for a new trial and it was error if the trial court relied on this issue to grant the motion for a new trial. See e.g., State v. Holmes, 320 S.C. 259, 266, 464 S.E.2d 334, 338 (1995) (new trial motion may not be used to raise an issue for the first time); McGee v. Bruce Hosp. Syst., 321 S.C. 340, 468 S.E.2d 633 (1996) (an issue may not be raised for the first time in a motion for a new trial); State v. Spears, 393 S.C. 466, 477, 713 S.E.2d 324, 329–30 (Ct. App. 2011) (finding issue of severance not properly preserved when not raised to and ruled upon during trial).

Mention of Arrest

Any mention of an arrest was not sufficiently prejudicial to warrant the grant of a new trial. The mention began as a passing reference to how law enforcement was able to obtain Respondent's real name and not just know his nickname. Respondent's counsel then expanded the discussion of the arrest, not the State.

At trial, a discussion ensued between Respondent's counsel and Detective Brooks regarding the sequence of events leading to Evans identifying Respondent in a lineup. After some confusion, Detective Brooks explained:

All right. To the best of my recollection, it was during the interview with Mr. Evans, which as you referenced is on July 30th, that he acknowledged the suspects that he only knew them by their nicknames. Part of what I requested of him was as he spoke with family members to try to learn their real names. Evans later told me that he'd spoken with his mother who had indicated to him two things. One was that she believed C-Lo's real last name was Corey Brown. And two, that he has been arrested recently following this incident.

(T.290; R.303). After this, Respondent's counsel sought to clarify who was arrested and Detective Brooks indicated Respondent. Counsel then continued with the cross-examination of Detective Brooks:

- Q. That was her belief?
- A. That's what she told Shadarron Evans was her belief.
- Q. But that wasn't actually true, was it?
- A. It was completely truthful.
- Q. Mr. Brown was not in custody?
- A. He was in custody in Georgia.
- Q. After he was arrested for these warrants, correct?
- A. No, ma'am. As I recall, somewhere around the same time, he was arrested in Georgia in a completely unrelated incident. I believe he made bail and was released. He could have remained incarcerated. I'm not sure, but that led us to the identification of Mr. Brown.
- Q. So you're the investigator on this case. Do you know the circumstances behind Mr. Brown being picked up in Georgia?
- A. No, ma'am; I don't.

(T.291; R.304). The discussion continued with questions about what information Detective Brooks found which lead him to believe Respondent had been arrested, and then the information about mugshots.com surfaced. (T.291-294; R. 304-307). All as a result of Respondent's counsel's continued questioning about the arrest. Because Respondent's counsel brought out

much of the information about the arrest, he cannot now complain of prejudice from his own conduct. See State v. Sawyer, 409 S.C. 475, 479 n. 2, 763 S.E.2d 183, 185 n. 2 (2014) (“It is well-settled that a party cannot complain of an error it induced.”); State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984) (defendant cannot complain of an error induced by his own conduct); State v. Carlson, 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005) (“A party cannot complain of an error which his own conduct has induced.”).

Additionally, any mention of the entirely unrelated arrest in Georgia, even after Respondent’s counsel continued questioning, were merely vague references which could not have prejudiced Respondent. See e.g., State v. Robinson, 238 S.C. 140, 119 S.E.2d 671 (1961), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (Court emphasizing that, even if the testimony created the inference in the jury’s mind that the accused had committed another crime, the State never attempted to prove the accused had been convicted of some other crime); State v. Thompson, 352 S.C. 552, 561, 575 S.E.2d 77, 82 (Ct. App. 2003) (“[A] vague reference to a defendant’s prior criminal record is not sufficient to justify a mistrial where there is no attempt by the State to introduce evidence that the accused has been convicted of other crimes.”); State v. Manning, 400 S.C. 257, 269–70, 734 S.E.2d 314, 320 (Ct. App. 2012) (holding a single reference to a severed charge did not constitute sufficient prejudice to warrant a mistrial). As a result, the trial court erred in granting a new trial on this ground.

Because none of the grounds raised were a proper basis on which the trial court could grant a new trial, the trial court abused its discretion. This grant of a new trial should be reversed and Respondent’s convictions and sentences reinstated.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the decision of the circuit court granting a new trial was an abuse of discretion and should be reversed. Respondent's convictions and sentences for armed robbery, kidnapping, and conspiracy should be reinstated.⁷

Respectfully submitted,

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February 26, 2020

⁷ In the alternative, if this Court finds the trial court did premise its decision on any of the enumerated grounds listed in Issue II above, this Court could remand for specific findings of fact and conclusions of law supporting that grant.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Greenwood County
The Honorable Eugene C. Griffith, Jr., Circuit Court Judge
Appellate Case Tracking Number 2018-001289

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30 Court of Appeals

The State,

Appellant,

v.

Corey Brown,

Respondent.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Final Brief of Respondent filed February 26, 2020, complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings, 375 S.C. 56, 650 S.E.2d 462 (2007)(requiring redaction of social security numbers, names of minor children, financial account numbers, and home addresses).

This 26th day of February, 2020.



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