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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Honorable J. C. Buddy Nicholson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

STEWART JEROME MIDDLETON,

PETITIONER.

APPELLATE CASE NO. 2020-001665

BRIEF OF PETITIONER

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ISSUE PRESENTED

Whether the Court of Appeals erred by finding no abuse of discretion in the trial court allowing Detective Bailey to testify that petitioner did not show up for two appointments with her, and that it allegedly took him seventeen to twenty days to meet with the detective as she requested, since this testimony was not relevant to the issue of petitioner's guilt or innocence?

STATEMENT OF THE CASE

Petitioner was indicted at the May, 2014 term of the Charleston County Grand Jury for the offense of criminal sexual conduct in the third degree. R. 348 – 349. Petitioner's case came on for trial on October 23, 2017, before the Honorable J.C. Nicholson, Jr., and a jury. James Smiley and Laree Hensley represented petitioner. The assistant solicitors were Andrew Evans and Jessica Baldwin. R. 1.

On October 26, 2017, the jury found petitioner guilty. R. 337, ll. 17-23. Judge Nicholson sentenced petitioner to six years' imprisonment, suspended upon the service of six months, and five years' probation. R. 344, ll. 19-25.

The Court of Appeals (Huff, Thomas, and McDonald, JJ.) affirmed petitioner's conviction in State v. Stewart Jerome Middleton, 2020-UP-271 (September 30, 2020). App. 1-4. Petitioner sought rehearing. App. 5-8. Rehearing was denied. App. 9.

Petitioner sought certiorari on the directed verdict issue, and the evidentiary issue that is the subject of this brief of petitioner. The state filed a return. Certiorari was granted on the evidentiary issue and denied on the directed verdict issue.

This brief of petitioner 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 Court of Appeals erred by finding no abuse of discretion in the trial court allowing Detective Bailey to testify that petitioner did not show up for two appointments with her, and that it allegedly took him seventeen to twenty days to meet with the detective as she requested, since this testimony was not relevant to the issue of petitioner's guilt or innocence.

Relevant trial facts

Kayla I., helped plan the SKF company's Christmas party on December 14, 2013, at the Embassy Suites Hotel in Charleston. R. 33, ll. 2-22. Kayla I. was five-foot-four, and she weighed 115 pounds. She told the solicitor at trial that she was not "[a] big drinker back then." R. 36, ll. 9-23.

She remembered she got to the Embassy Suites at about one o'clock that afternoon. She went to eat, and she thought she had dinner about three or four o'clock. R. 35, ll. 7-24. She then went back to her hotel room where she maintained she had "[t]wo of the small plastic cups that come in the hotel room, half sprite and half Ciroq [vodka]." R. 36, ll. 3-13. Kayla I. then went with her friend Yolanda Alston to the ballroom on the second floor for the Christmas party. There were about thirty or forty people at the party at that time with more expected to arrive. R. 37, ll. 2-23.

Petitioner was a coworker of Kayla I's, but he was not at the Christmas party at that time. R. 37, l. 24 – 38, l. 8. After about an hour-and-a-half, Kayla I., remembered, "[I] was really intoxicated as well as sick, and that was pretty much it. That's when I decided it was time for me to leave." R. 38, ll. 9-21.

Kayla I. (hereinafter the "complainant") said she asked another coworker, Jimmie Filbeck, to escort her back to her room. Although Filbeck's wife was not at the party at the time,

the complainant maintained: "I asked him and his wife to come back and check on me when they were leaving the party, just to make sure I was okay." She gave Jimmie Filbeck her room key so he could "get back into the room." R. 38, l. 22 – 39, l. 15.

The "next thing she remembered" was "Jimmy and his wife coming in the courtroom (sic) [her room], startled, kind of jumped up [on the bed] and I remember him saying, 'we just came to check on you' and that was it." The complainant said that was the last thing she remembered happening at the hotel, and that she did not recall interacting with petitioner or consenting to have sex with him or anyone else that evening. R. 40, ll. 2-20. She next remembered "waking up in the hospital at Roper St. Francis." R. 40, ll. 21-23. The complainant remembered a nurse or nurses "told me that I was there because I had gotten raped. Again, I didn't know what was going on . . ." R. 41, ll. 13-21.

The next day she spoke with Jimmie Filbeck, Yolanda Alston, and petitioner. R. 42, ll. 3-13. She said she got petitioner's phone number from Filbeck. Her first conversation with petitioner was very short, apparently because he was around other people. "When he called back, he told me he wasn't able to talk. The first time I called, he was around some people, and he proceeded to tell me what happened. He told me I was drunk. He kept going back and forth with what happened. I was ready to get off the phone, and he made the statement, you really don't remember, do you? And I told him, no. Like, tell me, stop playing, you know, with me. Just tell me what happened, and he said yes. You know, we had sex." R. 42, l. 21 – 43, l. 16.

She said later that day that she was texting petitioner, at the suggestion of her police officer friend, to get petitioner's position in writing, and petitioner wrote back: "I'm so sorry. I guess you was drunk. I was drunk, and it should never have happened." R. 45, l. 16 – 46, l. 6. The complainant asked petitioner if he had worn a condom, and he responded: "Yes." R. 347.

The complainant remembered she saw petitioner at work on Monday after the party which was not unusual since they worked together. "He came in and made eye contact with me and then kind of left out." R. 46, ll. 19-22. The complainant said she talked to other people at work including her general manager and her HR manager at SKF. She later filed a complaint with the police department. R. 51, ll. 12-16. She sued the Embassy Suites hotel because a desk clerk gave petitioner a key to her room. As will be seen infra, and which is included in State's Exhibit 6 which is before this Court for review, petitioner told Detective Bailey that he returned to the complainant's room with Jimmie Filbeck and his wife to check on the complainant. Filbeck would testify that the complainant jumped out of bed naked in front of the three of them. Petitioner told the police that she thereafter came into the hall near the elevator with a towel wrapped around her, and she locked herself out of her room when the door closed behind her.

Petitioner then went to the front desk to get a key to the room to let her back inside. Petitioner said when he opened the door to the hotel room with the new key that they had consensual sex in her hotel room on the carpeted floor. See State's Exhibit 6, the DVD of the interview with Detective Bailey which was on file with the Court of Appeals.

The complainant acknowledged she received a "six figures" or more settlement from the Embassy Suites. After petitioner was fired from the corporation where they both worked, she said she took six months of paid leave, and she filed an EEOC claim. She lived in California while she was on disability. R. 68, l. 1 – 69, l. 19. The complainant acknowledged that she had been given a "bad conduct" discharge for fraud from the Air Force before she went to work for SKF. R. 32, ll. 20-21; R. 49, l. 14 – 50, l. 20.

The complainant told defense counsel Smiley on cross-examination that she did not remember locking herself out of the room that night. She claimed she did not recall seeing

petitioner or seeing petitioner come into her room that night. She denied that she smoked marijuana, but she admitted marijuana was found in her hotel room the next day. R. 58, l. 2 – 59, l. 20.

The complainant did not remember how she got from her hotel room down to the service elevator area where she was found that evening. R. 60, l. 11 – 61, l. 15. Mitchell Rumsey was a manager working at the hotel on the night of December 14, 2013. He remembered seeing the complainant crouched down by a service elevator crying. Rumsey said this service area where he found the complainant was "an employee area." Guests should not have been in this area of the hotel. Rumsey opined the complainant was intoxicated, and she was "belligerent." She could walk, but he helped "steady her." R. 24, l. 24 – 25, l. 16.

Rumsey thought, "Something not positive had occurred." The complainant then said she had "been raped," according to Rumsey. Rumsey took her into his office and called 911. R. 8, l. 15 – 14, l. 24. The complainant further testified she did not remember telling a detective or police officer that she had *not* been sexually assaulted that evening. "I remember waking up that night. I don't remember being at the hospital. . . At that point, I woke up in the hospital. I was scared. They said I had gotten raped." She turned down any sexual assault protocol because she testified that she wanted to leave the hospital and go home. R. 62, l. 15 – 65, l. 4.

On cross-examination, the complainant said that petitioner was "short" with her when she called him the next day. "I was just going to, like, chalk it up to nothing happened; like, maybe I was just too intoxicated at that point until he called me back." R. 66, ll. 13-17. She repeated that petitioner told her during their second phone conversation that "we had sex." R. 67, ll. 3-16. Her friend, Deputy Green, told her to have petitioner admit to having sex with her in writing,

which she did by way of a text message. R. 67, ll. 3-25; R. 346. The following occurred on cross-examination of the complainant:

> Q: And he [petitioner] was very, at that point, straightforward, correct?
>
> A: Correct.
>
> Q: He told you he was sorry, right?
>
> A: He did.
>
> Q: Okay. *And he didn't realize you were that drunk*
> .
> *A: Not that drunk. He said, I guess you were drunk.*

R. 67, l. 21 – 68, l. 2. (emphasis added).

In petitioner's interview with Detective Bailey, which again, is before this Court as State's Exhibit 6, petitioner told Bailey he went to the complainant's room with Jimmie Filbeck to check on her. She came into the hall with a towel wrapped around her, after she had jumped out of the bed naked. She got locked out of her room in the process. Petitioner therefore went to the front desk and obtained another key to her hotel room. Rumsey, the manager, said the man who asked him for another key to the complainant's room said the complainant was his "friend" or "girlfriend." R. 10, l. 9 – 13, l. 6.

As to his knowledge of the complainant prior to the Christmas party, petitioner said he knew she liked to "party a lot." Petitioner said he based that belief on her conduct at prior Christmas parties that he apparently heard about at work. Petitioner remembered that people at the party that night were talking about the complainant "embarrassing herself." She was "hammered." Petitioner remembered speculation at the party about "how was she going to go back to work?" As stated, petitioner said he obtained another key to the complainant's hotel

room after she locked herself out. He let her back into the hotel room with the new key. The complainant and petitioner then had sex on the carpet inside her hotel room.

Petitioner said the complainant called him the next day. Strangely, she claimed she had been hit by a car. Petitioner talked with her about them having sex the night before, and he asked her if she did not even remember them having sex. The complainant apparently maintained she was just "trying to figure out what happened."

Yolanda Alston remembered getting to the Christmas party at about 8:00 that night. She saw the complainant, and they hugged. "When I saw her, I could tell she was intoxicated." Yolanda remembered going to the complainant's room and seeing her drink "clear liquor." R. 80, l. 24 – 81, l. 25. Alston estimated on a scale of 1 to 10 of intoxication, "I would give her [an] 8." Alston said she and other coworkers decided the complainant needed to "be taken away from the party" because she was embarrassing herself. R. 81, l. 11 – 82, l. 22.

Alston saw petitioner at the party, and she spoke to him when she was getting ready to leave. She could not tell if petitioner was also intoxicated. R. 83, ll. 2-19. She remembered that the complainant and petitioner continued to work at SKF for about another month after the Christmas party. R. 87, ll. 16-24.

Co-worker Jimmy Filbeck testified he did not knock on the complainant's door before they entered that night because "[I] thought she would be passed out." Petitioner entered the hotel room with Filbeck and his wife. "Kayla jumped up out" of the bed naked. "It was a shock." "I don't think anybody said any words, actually, it was just everybody left." Filbeck claimed that he did not remember if his wife said anything to him about the incident at the time. R. 115, l. 6 – 116, l. 21; R. 117, l. 5 – 118, l. 17.

Joye McElroy was a nurse at St. Francis hospital where the complainant was transported that evening. R. 147, l. 4 – 148, l. 7. McElroy said she could *not* point to anywhere in the nurses' or physicians' notes where it said the complainant complained of a sexual assault. R. 178, l. 1 – 179, l. 4. McElroy admitted that the complainant declined a sexual assault exam. R. 179, ll. 5-23. McElroy acknowledged that on the Glasgow Coma Scale, Kayla was given a rating of 15. This was a "good number," meaning that the complainant was *conscious, interacting, and making eye contact*. R. 180, ll. 3-24. (emphasis added).

Nurse McElroy was aware that the complainant took Ativan daily, and that she had a medical history of anxiety. The complainant denied using alcohol on a social basis. However, she admitted to "recent binge" drinking, using street drugs and marijuana. R. 180, l. 10 – 183, l. 9.

Detective Bailey testimony

Detective Rebecca Bailey investigated the Christmas party incident in this case. On direct examination, Detective Bailey was asked how many times she scheduled an interview with petitioner. Defense counsel Smiley objected on the basis of relevance. The judge overruled that objection. R. 191, l. 23 – 192, l. 4. Detective Bailey then answered:

> First time I made contact with the defendant, I want to say it was February 3rd. Don't quote me, around there, the 3rd, 4th. *I know it took about 17 to 20 days for him to come in. He didn't show for the first two. He would call after the fact, or, like, 24 hours later. Then -- because we were having such a difficult time getting him to actually stick to an appointment* and come in, I told him, Go home. Look at your schedule. Find a day that suits you and your place of employment, and then call me and you tell me what day you want to come in, and I'll accommodate -- whatever day, whatever time, I'll accommodate you.
>
> So he left city hall, and he never called me back. So I had to reach out to him again. *It was 12 or 13 days after not hearing from him, and then we finally met on February 20th.*

Q: So it was February 20 when you finally got to interview him?

A: Yes.

Q: Was he in custody at the time you interviewed him?

A: He was not.

R. 192, ll. 5-25. (emphasis added).

Defense counsel Smiley would later, as he had every right to do, attempt to minimize the damage of this testimony on cross-examination. Bailey said it "took some time" for petitioner to talk to her, but she admitted on cross-examination that petitioner was under no obligation to talk to her at all. R. 212, ll. 9-20. Defense counsel Smiley asked Detective Bailey to admit there were some delays with interviewing others in this case. Detective Bailey would not budge: "*No delays other than with Mr. Middleton.*" As to Embassy Suites Employee Rumsey, Bailey said Rumsey was hesitant to come in, but his manager told her that he would have Rumsey come in right away and bring the tapes with him. R. 212, l. 9 – 214, l. 19. (emphasis added).

Bailey said that she also "played phone tag" with Mr. Green, a friend of the alleged victim. However, Detective Bailey then proclaimed, "Your client is the only one who was *ducking and dodging me*. Everybody else -- except for maybe Rumsey who didn't want to come in that day, but his manager made him. Everybody else, it was just a scheduling issue." Bailey said petitioner "just didn't show, and he'd come in later or wouldn't call, and he didn't call back, *and it took 13 days, and it just -- I was trying to get him to come in*." R. 212, l. 9 – 214, l. 19. (emphasis added). Bailey was doing everything she could to hurt petitioner in the eyes of the jury.

Court of Appeals

The Court of Appeals, in its summary opinion, held the trial judge did not err by admitting this evidence petitioner failed to show up for two appointments for an interview and

delayed giving a statement because it was evasive conduct relevant to show consciousness of guilt. App. 3.

Discussion

Defense counsel correctly objected that Detective Bailey's testimony about petitioner missing appointments, or not "showing up" until later was not relevant. It did not make it more or less probable that he was guilty in this case for any legitimate reason. See Rule 401, SCRE. This inadmissible testimony was also very prejudicial.

As Detective Bailey would later acknowledge, petitioner was under no obligation to talk to her – he had the right not to be interrogated, and to remain silent. What happened here was as prejudicial as a comment on a defendant's right to silence, which obviously is totally improper. Cf. State v. McIntosh, 368 S.C. 432, 595 S.E.2d 484 (2004), *citing* Doyle v. Ohio, 426 U.S. 610 (1976). See also, State v. Gray, 304 S.C. 482, 405 S.E.2d 420 (1991). Further, as petitioner argued in his rehearing petition:

> This Court cited State v. McDowell, 266 S.C. 508, 515, 224 S.E.2d 889, 892 (1976), in support of this proposition of law. In McDowell, the court found that evidence the defendant was affirmatively seeking evidence about how to "beat" the polygraph examination was admissible to show his consciousness of guilt. However, the court was careful to point out that evidence the defendant refused to take an offered polygraph examination would have been inadmissible. Here, appellant not showing up for two appointments with the police was more in line with a refusal to take a polygraph than it was with the admission of any other evidence of evasion. Detective Bailey clearly wanted to interrogate appellant, and evidence appellant did not want to be interrogated by the police was impermissibly used as evidence of his guilt in the same manner as if appellant had been read his Miranda warnings and then refused to talk with the police. That would clearly have been a Doyle violation.[1] Appellant was under no obligation to talk to Detective Bailey, and evidence appellant initially chose to remain silent by not meeting Detective Bailey to

[1] Miranda v. Arizona, 384 U.S. 436 (1966); Doyle v. Ohio, 426 U.S. 610 (1976).

> be interrogated was unfairly used against him as evidence of his guilt.

App. 5-6.

This testimony was not relevant, and, as stated. this is not a case of an evidentiary error without prejudice. This testimony also was not evidence of flight in any manner, and it was only meant to impermissibly cast undue suspicion upon petitioner for irrelevant reasons. See State v. Pagan, 369 S.C. 201, 331 S.E.2d 262 (2006) (impermissible evidence of flight or guilty knowledge).

The prejudice of deliberately making petitioner seem evasive from which the jury would infer he had guilty knowledge was extremely prejudicial particularly where in this case it was unclear just what petitioner morally or legally may have been guilty of doing. The import of Detective Bailey's testimony was clear: She thought petitioner was avoiding her because he was guilty of an illegal sexual assault. The solicitor wanted to jury to draw that impermissible spurious conclusion of petitioner's guilt from Detective's Bailey's irrelevant testimony.

In State v. Sloan, 278 S.C. 435, 439, 298 S.E.2d 92, 94 (1976), this Court held the trial court erred by admitting evidence that Sloan made no attempt to talk to the police prior to being served with the arrest warrant. This Court noted that "the prosecution may not use at trial the fact that a defendant stood mute in the face of accusation, except for impeachment purposes. Jenkins v. Anderson, 447 U.S. 231 (1980); Miranda v. Arizona, 384 U.S. 436 (1966). Here, the defendant did not testify and thus did not cast aside his right to remain silent." Petitioner Middleton likewise did not testify, and the trial court here erred by admitting evidence petitioner did not show up to be interrogated by Detective Bailey when he was no obligation to answer those questions. The Court of Appeals likewise erred by ruling Detective Bailey's testimony in this regard was relevant to show petitioner's "consciousness of guilt." App. 3.

This Court dealt with such a consciousness of guilt legal issue in State v. Cartwright, 425 S.C. 81, 810 S.E.2d 756 (2018), as it pertained to attempted suicide. As in this case, the state argued that a suicide attempt while criminal charges were pending against the defendant awaiting trial was admissible as "consciousness of guilt." This Court held that evidence of a defendant's attempted suicide may only be admitted if, following a hearing, it was shown that there was an unmistakable nexus linking the suicide attempt to a guilty conscience derivative of the offense. This Court also noted it would be a rare case in the future given this rigorous standard that evidence of a suicide attempt would be admissible to show consciousness of guilt. State v. Cartwright, 425 S.C. 81, 92-93, 810 S.E.2d 756, 762 (2018).

The missing appointments in this case was also not evidence of flight, and it was only meant to impermissibly cast undue suspicion upon petitioner for irrelevant reasons. See State v. Pagan, 369 S.C. 201, 331 S.E.2d 262 (2006) (impermissible evidence of flight or guilty knowledge). This record is devoid of evidence that this petitioner left town, that he moved, hid, or fled in any manner. There were also not any criminal charges pending against him, and it was undisputed that Bailey only wanted to talk to petitioner, not arrest him. Detective Bailey admitted petitioner had no obligation to talk to her, and she was merely opining to petitioner's considerable detriment he was allegedly avoiding her, and that petitioner was the only witness avoiding her. The impermissible inference the state wanted the jury to draw was that Detective Bailey thought petitioner was guilty, and that he was guilty because Bailey was strongly asserting petitioner was less than eager to talk to her about the Christmas party aftermath.

Solicitors using law enforcement officers to signal to the jury that they believe certain witnesses and not others is a disturbing trend in our state. Recently, for example, in State v.

Geter, Op. No. 5851, Shearouse's Adv. Sh. #28, at 82-95 (Ct. App. filed August 18, 2021), 2021 WL 3641733, the Court of Appeals dealt with a case where the circuit court judge allowed the state's chief investigator to testify that that Geter's opening statement to the jury was the first time he had heard the defense's self-defense "scenario of the facts" and that Victim Stone's pretrial statement and testimony were conversely "consistent." It went as follows:

> [STATE]: And you were here in opening statements, correct?
>
> [CLARKE]: Yes.
>
> [STATE]: Is that the first time you heard that story?
>
> [CLARKE]: No. Oh, that story?
>
> [STATE]: Yes, the story that he gave about – in opening statements?
>
> [GETER]: Your Honor. I object. Openings are not evidence, so.
>
> THE COURT: Overruled.
>
> [STATE]: His scenario of the facts that Mr. Geter's attorney is now saying happened, is that the first time you have ever heard that?
>
> [CLARKE]: *Yes.*
>
> [STATE]: You confirmed that Clarence Stone was also a victim?
>
> [CLARKE]: I did.
>
> [STATE]: And you spoke with him as well?
>
> [CLARKE]: I did. I took a statement at his home.
>
> [STATE]: And he gave a statement of what occurred?
>
> [CLARKE]: He did.

[STATE]: You saw him testify again today?

[CLARKE]: I did.

[STATE]: *And was that exactly what he told you*?

[GETER]: Objection. Your Honor. Improper vouching.

THE COURT: Overruled. You are asking about the testimony that he gave?

[STATE]: Yes. We watched him just a few minutes ago.

THE COURT: Overruled.

[STATE]: *The same thing he told this jury happened to him is what he told you*?

[CLARKE]: *Seems absolutely consistent*. Correct.

State v. Geter, Op. No. 5851, Shearouse's Adv. Sh. #28, at 83-85 (Ct. App. filed August 18, 2021), 2021 WL 3641733, at pp. 1-2. (emphasis added).[2]

While reversing on other grounds regarding an erroneous jury instruction in Geter, the Court of Appeals found part of the legal issue above was not preserved, and the part that was properly preserved was harmless error. The salient point is that legal enforcement officers are supposed to be fact witnesses at trial and irrelevant subtle or not so subtle signals to the jury regarding which witnesses law enforcement officials believe and which witnesses they do not believe are improper and they are highly prejudicial.

Here Detective Bailey testified, in obvious context, that petitioner was avoiding her, and she strongly stated that petitioner was the only witness not being immediately forthcoming with her. The other witnesses conversely were cooperative. This is a disturbing prosecutorial trend

[2] State v. Geter was pending on rehearing on the date this brief of petitioner was filed with this Court.

with using law enforcement officials in this manner rather than in their proper role as fact-finding neutral witnesses.

The error was not harmless here because it is not too much to say that petitioner was convicted of criminal sexual conduct in the third degree in this highly unusual case based on suspicion. The evidence, most respectfully, cannot seriously be argued to have been overwhelming in this case where the defense correctly had very strongly submitted that a directed verdict should have been issued. Petitioner's defense was consent, and the issue of the complainant's alleged inability to consent to sex with her co-worker because of "incapacity" was certainly a close, troublesome legal issue. The admission of Detective Bailey's very prejudicial irrelevant testimony was not harmless beyond a reasonable doubt. See State v. Davis, 371 S.C. 170, 638 S.E.2d 57 (2006); State v. Lee-Grigg, 374 S.C. 388, 649 S.E.2d 41 (2007).

CONCLUSION

By reason of the foregoing argument, petitioner's conviction should be reversed, and this case remanded to the Charleston County Court of General Sessions for a new trial.

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This 21st day of October, 2021.