ORIGINAL

RECEIVED
APR 23 2013
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CORY GETHERS,

APPELLANT

APPELLATE CASE NO. 2011-204886

FINAL BRIEF OF APPELLANT

BREEN RICHARD STEVENS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

STATEMENT OF ISSUES ON APPEAL

I. Whether the trial court reversibly erred by permitting the State to impeach Appellant on cross-examination by reading aloud before the jury from a document and questioning Appellant after each line read where the document was never entered into evidence, where the State relied upon the document in its closing argument, and where the jury specifically requested to see the document during deliberations?

II. Whether the trial court reversibly erred by preventing Counsel from cross-examining the State's only witness at trial regarding the details of excessive force used by the witness when arresting Appellant and the possibility of a lawsuit stemming from it, where Appellant sought to impeach the witness by showing bias, prejudice, or motive to misrepresent in order to avoid the possibility of a civil lawsuit?

STATEMENT OF THE CASE

Appellant Corey L. Gethers was indicted by the Charleston County Grand Jury on March 1, 2010, for failure to stop for a blue light (FSBL), and assault on a police officer while resisting arrest. R. 4, lines 1-3; R. 187 (Indictments). The charges stemmed from an incident on the night of December 21, 2009. The State disposed of the charge of assault on a police officer while resisting arrest by *nolle prosequi* on December 6, 2011, but first proceeded to trial for FSBL before the Honorable Deadra L. Jefferson and a jury from December 1st through 2nd, 2011. R. 1, R. 6, line 21—R. 7, line 4; R. 190 (Indictment/Warrant Status Change Form). Andrew David Grimes and Victoria Anderson (collectively, "Counsel") represented Appellant, while James P. Stack represented the State. R. 1.

The jury found Appellant guilty of FSBL. R. 177, lines 4-15. He was sentenced to one year incarceration with credit for time served. R. 184, lines 4-8.

STATEMENT OF THE FACTS

Appellant Corey L. Gethers was in a Suzuki Forenza (Forenza) on the night of December 21, 2009. According to his trial testimony, Appellant was picked up from his residence in North Charleston earlier that night by his friend, Tony, in order to get dropped-off at the Royal Z Lanes bowling alley in Goose Creek. R. 92, line 2-21; R. 94, lines 14—R. 95, line 13; R. 127, line 24—R. 128, line 8. Additionally, Appellant also stated that another passenger, Roy, was in the car when Tony arrived. R. 92, line 22—R. 93, line 5; R. 95, lines 15-20. As a result, Appellant indicated that he rode in the back seat of the Forenza next to the base to a child safety seat.[1] R. 95, line 21—R. 96, line 6.

Appellant further testified that Tony had to make a stop at Rivals Sports Bar (Rivals) on the way. R. 96, lines 7-13. After arriving at Rivals, Roy exited the Forenza and entered the bar. Appellant indicated that Roy got back into the Forenza approximately 15 minutes later, and Tony drove out of the parking lot to drop-off Appellant at the bowling alley. R. 96, line 11—R. 97, line 2; R. 113, lines 4-23.

At approximately 10:00 pm, Deputy Jason Cain (Cain), of the Charleston County Sheriff's Office, observed the Forenza exiting the parking lot of Rivals onto State Highway 78 (Hwy. 78). Cain turned his marked police cruiser round, and followed the Forenza. R. 32, lines 1-5; R. 113, lines 4-23. Appellant stated that he ducked down in the back seat when the police cruiser turned to follow. R. 113, line 24—R. 114, line 13; R. 123, lines 2-25. Cain claimed to see the Forenza stop for a red light beyond the stop line at the intersection of Hwy. 78 and College Park Road. He initiated his blue lights, the red light

[1] Appellant stated that the child safety seat base was not buckled to the seat. R. 95, line 25—R. 96, line 6; R. 133, line 16—R. 134, line 10.

turned green, and the Forenza proceeded into the parking lot of the nearby Piggly Wiggly. R. 32, lines 5-19; R. ii, (State Exhibit 1, DVD).

Once in the parking lot the Forenza accelerated, exited back onto Hwy. 78, and then turned down Ladson Road. After reaching speeds over 100 miles per hour, the car chase finally ended on One Notch Street in the Summerwood subdivision. R. 32, lines 19-24; R. 33, line 13—R. 34, line 10; R. ii, (State Exhibit 1, DVD).

According to Appellant's testimony, Tony and Roy immediately ran out of the Forenza, and Appellant followed out behind Tony because he was scared and did not know what was in the car.[2] R. 116, lines 4-24; R. 140, lines 2-25. Cain caught-up to Appellant as Appellant tried to climb a wooden fence. Cain then shocked Appellant eight to fifteen times with his taser;[3] he also pulled his service gun and threatened to put a "cap" into Appellant. R. 35, lines 2-9; R. 114, line 24—R. 115, line 25; R. ii, (State Exhibit 1, DVD).

During Appellant's trial, Counsel repeatedly attempted to impeach Cain's credibility and show bias or motive to misrepresent by questioning Cain about the use of excessive force when he handcuffed Appellant. However, the trial court sustained the State's objections on the basis of relevance. R. 63, line 2—R. 66, line 18. Although Counsel was able to get Cain to admit before the jury that he could be reprimanded or prosecuted for using excessive force, Counsel had to make an in camera proffer regarding deeper questions

---

[2] Cain indicated that he only saw two individuals in the Forenza, and that the person he saw leaving the driver seat and whom he chased was Appellant. R. 35, lines 13-20; R. 46, lines 1-3; R. 47, lines 16-23. As Cain also testified, no street lights were in the area, it was very dark, and one could not see anything without a flashlight. R. 41, lines 18-21.

[3] Cain admits to shocking Appellant eight times with his taser, while Appellant indicated he was shocked approximately fifteen times by Cain. R. 35, lines 2-4; R. 115, lines 21-25.

attacking Cain's credibility on the matter. R. 66, line 19—R. 67, line 7; R. 74, line 10—R. 78, line 18. Specifically, Counsel argued the testimony was relevant to show a bias by Cain against Appellant to see that Appellant is convicted in order to prevent ramifications against himself, such as a civil lawsuit:

> I said I believe it would be relevant, because it shows [Cain] may have a bias against [Appellant] to get a conviction here *to prevent, perhaps, a civil lawsuit.*
> . . . . .
> Well, that would be our position, though, that *if someone could be facing a civil lawsuit, it would be a great incentive*, I think, and as the Court would know, *he would have more sympathy from a jury if it is a convicted defendant as opposed to an acquitted person.*

R. 78, lines 22-24; R. 80, lines 9-13 (emphasis added). The trial court ruled that such questioning was not germane to the charge of FSBL, that Counsel must prove that a civil lawsuit is pending, and although there was approximately twenty days left for Appellant to file a civil lawsuit against Cain for use of excessive force, it was unlikely to occur:

> *You would have to prove that there was actually a suit pending. Otherwise, it's speculative and it leaves something really very misleading in the jury's mind and leaves the Court in the posture of having to explain to them about a civil suit, about the statute of limitations, and it gets to be very sticky and it's really tangential to the entire issue.* If he were, in fact, still proceeding on the assaulting a police officer while resisting arrest, I think all that would be germane. It would go to the amount of force used, if he was lawfully resisting an arrest, but to say that if he filed a lawsuit in the next fifteen days, which is what would be required in order for him to meet his applicable statute of limitations, it gets into a whole 'nother level of issue, *because not only does it have to be relevant, it can't be information that has the potential to mislead the jury, and in this case, it would, because you're dealing with legal principles that would have to be explained to them: If the lawsuit has not been filed, there is an applicable statute of*

limitations that expires on Wednesday the 21st of December, which is about two weeks from now. So, that means he would have to find a civil lawyer, have somebody willing to do it. In addition to that, he would have to hire an expert on excessive force, and the last time I checked, they cost about $40,000.00. There is only one guy in the country, almost, that does them and he's out of Atlanta and he requires payment in advance. Just so you know, that's how it works. I used to do those kinds of cases and that was ten years ago when he charged $40,000.00. I don't know what his fee is now. *So, the bottom line becomes, beyond all of that is, has he filed a suit? He hasn't. Is there potential for him to file a suit before the statute of limitations? Could he? Anything is possible. I don't know any lawyer that would take on that type of case. Federal Court is totally different. The burden is incredibly high. As a matter of fact, at the Directed Verdict stage in Federal Court, the Federal Judge has the ability to weigh the evidence and dismiss it and if he does not feel or she feels that it does not meet the appropriate burden of proof and it requires them to weigh the evidence that has been submitted. So, it's sort of misleading to the jury to say, "Didn't you do all these things because you are trying to avoid civil liability." When, in fact, a civil suit hasn't been filed and the likelihood of one being filed is really slim to none at this point.* Now, if, in fact, the State were proceeding on the assault of a police officer while resisting arrest, I think all that would be germane, because it would go to whether he resisted, lawfully resisted the arrest, whether there was proportionate force, whether he accidently injured the officer because he alleges that he was tased, you know, like so many different times. But you can hear on the video, although the officer was narrating it and no one objected, you can hear that he is not being compliant with being arrested. And so, what you then do is, you sorta fudge the issues, *which is in this case, the only thing that is relevant on a failure to stop for a blue light are the elements of, one, did he fail to stop?* Which is -- Well, let me back up, because I am getting a little ahead of myself. Which is, the State has to prove he was driving the car, which also shows the issue of identity. The State then also has to prove that he was signaled appropriately by law enforcement, which means a siren or flashing lights, and that he didn't stop and whether

> there were any mitigating circumstances that would justify him not stopping. For example: an emergency, bad road conditions, lighting, and other things that concern passenger safety. A lot of women don't stop in dark areas and that's one of those things that you would consider, especially with the possibility of them being injured and it might not be the police. So, there is no harm or foul going into a lighted area or to a police station or otherwise and maintain a moderate speed and not stopping. *I think, clearly, all of those things have been articulated and recognized as mitigating factors that the jury would consider.* Again, they would have to prove that it was an official signal, that being, a siren or flashing lights. Both are not required. And then, you know, of course the other things regarding speed. That's an evidentiary, you know, whether a person increased their speed to avoid being captured. *So, those are the only elements that are really relevant to the case for failure to stop for a blue light.*

R. 80, line 14—R. 83, line 20 (emphasis added).

The court determined that the defense failed to show an excessive force complaint was actually filed, that Cain was subject to disciplinary action, or that Cain's job was in jeopardy. Thus, the trial court held that, although credibility is always an issue, the defense failed to connect it with the testimony Counsel attempted to elicit:

> *Now, credibility is always an issue, but I've not seen any connection between what you have attempted to elicit,* which really what you are eliciting really is germane to the issue of assaulting a police officer while resisting arrest, but that charge has been nolle prossed. But if there -- *you haven't shown that an Excessive Force Complaint was filed. You haven't proven that he was subject to any disciplinary action, although I did let you go into some of that before the jury. You haven't indicated that his job was actually in jeopardy. So, those things would be relevant to his credibility. He actually faced them.* But you can't sort of throw stuff, you know, at a jury and see what will stick. *You have to have a good faith basis in asking those questions and some underlying factors to support it and it simply is not apparent, nor has it been elicited in this case.* And you can --I mean, I don't know if the State wants to

> ask the witness if he was subject to any disciplinary proceedings as a result of this, or whether was an Excessive Force Complaint was ever filed.

R. 83, line 21—R. 84, line 14 (emphasis added). As a result, Counsel was not allowed to cross-examine Cain before the jury on the matter.

Additionally, Appellant testified at his trial as well. During cross-examination, the State sought to use Defense Exhibit No. 2, a "tow sheet," to impeach Appellant's assertion that only the base to one child safety seat was in the back seat with him. Specifically, the State inquired as follows:

> Q. *You stated you were in the back seat.* Is that correct?
>
> A. Yes, sir.
>
> Q. And when Defense Counsel Anderson spoke with you, your statement was, that you were on the back seat on the passenger side. Is that correct?
>
> A. Yes, sir.
>
> Q. Okay. So, you are in the back seat on the passenger side and in that back seat were also two child seats. Isn't that correct?
>
> A. No, sir.
>
> . . . . .
>
> Q. I am going to show you Defense Exhibit, Defense Exhibit No.2, *which has already been entered into evidence.*

R. 120, lines 9-24 (emphasis added); R. 185 (Defense Exhibit 2, I.D. Only—Tow Sheet). Counsel immediately objected on the basis of improper impeachment.[4] The trial court overruled Counsel's objection, and held as follows:

> Overruled. It goes to his knowledge of what was actually in the vehicle. *It's an extraneous statement* and *serves to impeach his testimony.* You may proceed. *He was given the opportunity answer the question affirmatively, "yes, or no".* You may proceed.

R. 121, lines 3-7 (emphasis added). As a result, the State was permitted to read verbatim from the un-entered exhibit, and ask Appellant questions line by line:

> Q. I am going to read this paragraph to you and would you read along with me, please?
>
> A. Yes, sir.
>
> Q. Okay. "Inventory by Deputy and Wrecker Driver." Okay?
>
> A. Yes, sir.
>
> Q. And underneath it says, "Miscellaneous papers". Is that correct?
>
> A. Yes, sir.
>
> Q. "Factory radio." Is that correct?
>
> A. Yes, sir.
>
> Q. And "Two child seats." Is that correct?
>
> A. Yes, sir.
>
> Q. And "one brown jacket"?

[4] Although Counsel utilized Defense Exhibit No. 2 during the re-cross examination of Cain, the exhibit was expressly marked for identification purposes only; it was never entered into evidence. R. 3; R. 69, line 13—R. 70, line 6; R. 185 (Defense Exhibit 2, I.D. Only—Tow Sheet).

A. Yes, sir.

Q. Okay. And is there a signature of the wrecker company?

A. Yes, sir.

Q. And there is the signature of the deputy. Is that correct?

A. Yes, sir.

Q. Okay. Thank you. But your statement is, there was only part of one?

A. No, there was just the base of a baby seat.

R. 121, line 8—R. 122, line 6.

The State further relied upon the tow sheet in its closing argument to the jury to attack Appellant's testimony that he was not driving the Forenza, but was in the back seat of the vehicle. Specifically, the State argued as follows:

> *But the Defendant says he wasn't driving the car. He says he was in the back seat* even before the lights come on. You don't see any indication that he is back there, but you know he jumped out, or you heard the cop testify he jumped out of the front seat. *You see evidence, or you will see evidence, that tow sheet, where there were two child seats in that back seat.* I asked the officer, "Were they laying there or were they strapped in by regulation with seat belts? He said they were strapped in. Two child seats, not a part of one laying there. *When you look at the tow sheet, which is Defense Exhibit No.2*, I believe---

R. 159, lines 9-19 (emphasis added). Counsel immediately objected based on the State arguing an item that was not in evidence. R. 159, lines 20-22. After a bench conference, the State utilized the testimony it elicited regarding the tow sheet:

> You have heard the testimony from the Defendant in this case *when I showed him this tow sheet that the Defense put in without contest.* I asked the Defendant, "Were there

> miscellaneous papers there?" "Yes." "Was there a brown jacket there?" "Yes." And then I asked Mr. Gethers, does this tow sheet indicate there are two child seats in that car? And what did Mr. Gethers say? "Yes. There are two child seats indicated in that car by that tow sheet." And I asked him, "Who signed this down here? Is there a signature under the wrecker, the tow guy that comes out and pulls the car from the crime scene?" "Yes. The wrecker signed the sheet indicating the inventory." And who else signed this sheet? And Mr. Gethers, according to his testimony, said Deputy Cain and the tow truck driver, the wrecker driver, both signed that inventory sheet which indicated two car seats, two child's car seats and from the testimony of Deputy Cain, who indicated they were in the back seat and were properly strapped in by whatever regulations require.

R. 160, lines 1-19 (emphasis added).

Finally, during its deliberations, the jury specifically requested to see the tow sheet. However, because the exhibit was for identification purposes only and never entered into evidence, the trail court did not send Defense Exhibit No. 2 back to the jury. R. 175, lines 1-15; R. 186 (Court Exhibit 4, Question From the Jury). The jury later returned a verdict of guilt for FSBL, and the trial court imposed a sentence of one year. R. 177, lines 4-15; R. 184, lines 4-8.

This appeal follows.

ARGUMENT

I. The trial court reversibly erred by permitting the State to impeach Appellant on cross-examination by reading aloud before the jury from a and questioning Appellant after each line read where the document was never entered into evidence, where the State relied upon the document in its closing argument, and where the jury specifically requested to see the document during deliberations.

Appellant asserts that the trial court reversibly erred by permitting improper impeachment of Appellant by the State during cross-examination. The court's ruling indicates that the State was permitted to impeach Appellant with the tow sheet as a prior inconsistent writing. However, contrary to the court's ruling, the tow sheet was not proper for impeachment of Appellant's testimony. Further, because the writing does not qualify as a prior inconsistent statement, and because it was not entered into evidence, the State should not have been allowed to verbally publish the contents to the jury by reading from the document verbatim in its questioning of Appellant. Pursuant to the South Carolina Rules of Evidence, the State was permitted to ask Appellant what he saw in the back seat of the Forenza; however, it had to live with the response given by the Appellant without resorting to extrinsic evidence for impeachment purposes. Thus, the trial court erred in allowing the State to impeach Appellant on cross-examination by resorting to extrinsic information that was never entered into evidence.

Furthermore, Appellant was prejudiced by the trial court's error. The State not only read aloud the contents of the tow sheet to the jury, but it also explicitly relied upon the tow sheet in its closing argument to the jury in an effort to discredit Appellant's testimony regarding his position in the back seat of the Forenza. Moreover, the jury clearly focused on this information during its deliberations, as it specifically requested to see the document. Appellant's testimony and credibility were central to his defense, especially where the case

literally came down to a credibility contest between Appellant and Cain. As a result, Appellant was prejudiced by the trial court's erroneous admission of improper impeachment of Appellant's testimony. Accordingly, Appellant respectfully requests reversal of his conviction, and remand for a new trial.

Rule 613(b) of the South Carolina Rules of Evidence governs the admission of extrinsic evidence of prior inconsistent statements of a witness. Specifically, the rule provides in pertinent part as follows:

> Extrinsic evidence of a prior inconsistent *statement by a witness* is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. *If a witness does not admit that he has made the prior inconsistent statement*, extrinsic evidence of such statement is admissible. However, if a witness admits making the prior statement, extrinsic evidence that the prior statement was made is inadmissible.

Rule 613(b), SCRE (emphasis added). Thus, in order for extrinsic evidence of a prior inconsistent statement to be admissible, it must have been made by the witness against whom it is being used.

In the case at bar, the trial court's ruling indicates that it erroneously interpreted the State's use of the tow sheet as admissible under this rule. Specifically, after Counsel objected, the trial court ruled as follows:

> Overruled. It goes to his knowledge of what was actually in the vehicle. *It's an extraneous statement* and *serves to impeach his testimony*. You may proceed. *He was given the opportunity answer the question affirmatively, "yes, or no"*. You may proceed.

R. 121, lines 3-7. The language utilized by the court readily indicates that it's ruling was based upon application of Rule 613(b). First, it acknowledged that there was a dispute as to

what Appellant said he knew was in the back seat of the Forenza. Second, the trial court considered the tow sheet to be an "extraneous statement" that "serves to impeach [Appellant's] testimony." Third, the court deemed that the State was permitted to impeach Appellant with the tow sheet "statement" because Appellant "was given the opportunity to answer the question affirmatively." Therefore, it is clear that the trial court based its ruling to permit the State's impeachment of Appellant with the tow sheet on Rule 613(b) of the South Carolina Rules of Evidence.

However, this was an error of law. Rule 613(b) contemplates impeachment of a witness' testimony through the use of prior inconsistent statements made by that witness, not by any written piece of paper produced by other parties. Yet, in the present case, the State was expressly permitted to "proceed" with its impeachment of Appellant's testimony through the use of what the court ruled was an "extraneous statement": the tow sheet.

Moreover, such impeachment would likewise be improper under Rule 608(b) of the South Carolina Rules of Evidence. Rule 608(b) allows inquiry into specific instances of conduct of a witness as follows:

> **(b) Specific Instances of Conduct.** Specific instances *of the conduct of a witness*, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, *may not be proved by extrinsic evidence. They may*, however, in the discretion of the court, *if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness*, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

Rule 608(b), SCRE (emphasis added). Thus, according to both the title of the rule, as well as its clear and unambiguous language, extrinsic evidence of a witness' *conduct* may be

inquired into on cross-examination so long as such conduct is probative of truthfulness, and concerns the witness' character for truthfulness or untruthfulness. See Rule 608(b); see also State v. Kelsey, 331 S.C. 50, 75, 502 S.E.2d 63, 75 (1998) ("The inquiry under Rule 608(b) is limited to those specific instances of misconduct which are clearly probative of truthfulness such as forgery, bribery, false pretenses, and embezzlement."). However, the Rule does not allow instances of such *conduct* to be proven by extrinsic evidence. See, e.g., Mizell v. Glover, 351 S.C. 392, 401, 570 S.E.2d 176, 180 (2002) ("Essentially, Rule 608(b) allows specific instances of conduct to be *inquired into* on cross, but does not allow those instances of conduct *to be proved* by extrinsic evidence.") (emphasis in original).

In the present case, the tow sheet was not an instance of Appellant's conduct; rather, it was a document produced by a third party regarding what it believed it saw. Additionally, even if the tow sheet somehow was an instance of Appellant's conduct, the State was still not permitted to prove such conduct by effectively publishing the document to the jury by reading it aloud to Appellant. Such conduct by the State would effectively end-run the rules regarding admissibility of evidence. See, e.g., State v. Beckham, 334 S.C. 302, 321, 513 S.E.2d 606, 615 (1999) ("When a witness denies *an act* involving a matter collateral to the case in chief, the inquiring party is not permitted to introduce contradictory evidence to impeach the witness.") (emphasis added). Therefore, the trial court's allowance of the State to impeach Appellant with the tow sheet was improper even under Rule 608(b), SCRE.

Appellant was also prejudiced by the trial court's erroneous admission of improper impeachment of Appellant's testimony. First, the State was permitted to publish much of the document to the jury by reading it aloud in the jury's presence during cross-examination of Appellant. Second, during its closing argument to the jury the State specifically and

emphatically pointed to the tow sheet when attacking Appellant's testimony that he was in the back seat of the Forenza during the car chase rather than driving the vehicle. R. 159, lines 1-19; R. 160, lines 4-8. Finally, the jury focused on the tow sheet in its deliberations; it specifically requested production of the document in a note to the court during deliberations. R. 175, lines 1-15; R. 186 (Court Exhibit 4, Question From the Jury). Because the tow sheet was never entered into evidence, the trial court responded as follows:

> I make certain determinations about the admissibility of documents. You have everything you can see. Don't draw any inferences from it. If you need any testimony re-played, let us know, and I do that in writing.

R. 175, lines 4-8. Therefore, the jury was clearly focused on the tow sheet during its deliberations, and the thrust of the testimony regarding the tow sheet during trial revolved around the presence or absence of child safety seats in the back seat of the car. In other words, it is reasonable to assume that the jury had, at this point, focused critical attention on whose testimony to believe regarding whether Appellant was in the back seat of the Forenza. See, e.g., State v. Blassingame, 271 S.C. 44, 46, 244 S.E.2d 528, 529-30 (1978) (stating it was reasonable to assume the jury had focused critical attention on the meaning of two offenses where the jury sent a note requesting additional instructions on those definitions during deliberations). Appellant's testimony and credibility were central to his defense, especially where the case literally came down to a credibility contest between Appellant and Cain. As a result, Appellant was prejudiced by the trial court's erroneous admission of improper impeachment of Appellant's testimony, as it reasonably could have affected the result of the trial. See, e.g., State v. Davis, 371 S.C. 170, 181-82, 638 S.E.2d 57, 63 (2006) ("Error is only harmless 'when it could not reasonably have affected the result of the trial.'") (quoting State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985)).

II. The trial court reversibly erred by preventing Counsel from cross-examining the State's only witness at trial regarding the details of excessive force used by the witness when arresting Appellant and the possibility of a civil lawsuit, where Appellant sought to impeach the witness by showing bias, prejudice, or motive to misrepresent in order to avoid the possibility of a civil lawsuit.

The trial court also erred by preventing Appellant from impeaching the credibility of the State's only witness. Specifically, the court erroneously prevented Appellant from showing Cain's bias due to the possible contemplation of litigation against him by Appellant for the use of excessive force. Further, Appellant was prejudiced by the trial court's erroneous ruling because the case against him devolved to a credibility contest between the only two witnesses who testified: Cain and Appellant. Yet, Appellant was forbidden to demonstrate Cain's bias to the jury regarding potential civil litigation against him. Accordingly, Appellant respectfully requests reversal of his conviction, and remand for a new trial.

Rule 608(c) of the South Carolina Rules of Evidence permits impeachment of a witness by showing bias, prejudice, or any motive to misrepresent:

> **(c) Evidence of Bias.** 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. "This subsection of Rule 608 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 to his or her testimony.'" State v. Jones, 343 S.C. 562, 570, 541 S.E.2d 813, 817 (2001) (quoting State v. Brewington, 267 S.C. 97, 101, 226 S.E.2d 249, 250 (1979)). This is because "it is the function of the jury to determine the credibility of witnesses and the weight to be given their testimony." Brewington, 267 S.C. at 100, 226

S.E.2d at 250 (citing 98 C.J.S. Witnesses § 460). Accordingly, "[o]n cross-examination, any fact may be elicited which tends to show interest, bias, or partiality of the witness." State v. Mizzell, 349 S.C. 326, 331, 536 S.E.2d 315, 317 (2002) (quoting Brewington, 267 S.C. at 101, 226 S.E.2d at 250). Importantly, "[e]vidence of contemplated litigation *is relevant and admissible to demonstrate bias*." State v. McFarlane, 279 S.C. 327, 330-31, 306, S.E.2d 611, 613 (1983) (emphasis added).

In the present case, the trial court erroneously prevented Appellant from questioning Cain regarding the potential civil lawsuit he faced for using excessive force against Appellant on the night of December 21, 2009, when Cain tased Appellant eight to fifteen times, and then drew his service pistol and threatened to "cap" Appellant. R. ii, (State Exhibit 1, DVD). Moreover, as the court recognized, the statute of limitations had not yet run by the time the State called Appellant's case for trial. R. 80, line 14—R. 83, line 20. The trial court held that, although credibility was always an issue, Appellant failed to connect it with the testimony Counsel attempted to elicit:

> *Now, credibility is always an issue, but I've not seen any connection between what you have attempted to elicit*, which really what you are eliciting really is germane to the issue of assaulting a police officer while resisting arrest, but that charge has been nolle prossed. But if there -- *you haven't shown that an Excessive Force Complaint was filed. You haven't proven that he was subject to any disciplinary action, although I did let you go into some of that before the jury. You haven't indicated that his job was actually in jeopardy. So, those things would be relevant to his credibility. He actually faced them.* But you can't sort of throw stuff, you know, at a jury and see what will stick. *You have to have a good faith basis in asking those questions and some underlying factors to support it and it simply is not apparent, nor has it been elicited in this case.* And you can --I mean, I don't know if the State wants to ask the witness if he was subject to any disciplinary

> proceedings as a result of this, or whether was an Excessive Force Complaint was ever filed.

R. 83, line 21—R. 84, line 14 (emphasis added). However, South Carolina law does not require a civil suit to have been actually filed before a witness may be examined on the matter in order to demonstrate bias. Rather, mere contemplation of such an action is sufficient to show a good faith basis for such an inquiry to demonstrate bias at trial. See, e.g., McFarlane, 279 S.C. at 330-31, 306, S.E.2d at 613 ("Evidence of *contemplated* litigation is relevant and admissible to demonstrate bias.") (emphasis added). Furthermore, contrary to the trial court's ruling, such evidence is indeed both relevant and admissible. Regardless of whether the State intended to *nolle prosequi* Appellant's charge of assault on a police officer while resisting arrest—which was not done until four days *after* Appellant's trial for FSBL—the fact remained that on the day he testified against Appellant, Cain could have likely contemplated facing litigation by Appellant for his use of excessive force against Appellant on December 21, 2009. R. 80, line 14—R. 83, line 20; R. 190 (Indictment/Warrant Status Change Form, Indictment # 210GS1002021). As a result, Counsel properly sought to demonstrate Cain's bias against Appellant to see that Appellant is convicted in order to prevent a civil lawsuit against himself:

> I said I believe it would be relevant, because *it shows [Cain] may have a bias against [Appellant] to get a conviction here to prevent, perhaps, a civil lawsuit.*
>
> . . . . .
>
> Well, that would be our position, though, that *if someone could be facing a civil lawsuit, it would be a great incentive*, I think, and as the Court would know, *he would have more sympathy from a jury if it is a convicted defendant as opposed to an acquitted person.*

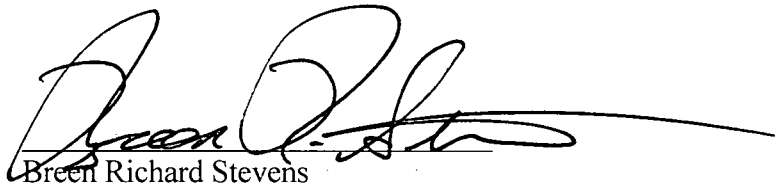
R. 78, lines 22-24; R. 80, lines 9-13 (emphasis added). Thus, the trial court's denial of Appellant's ability to demonstrate such bias by Cain was erroneous.

Furthermore, Appellant was prejudiced by the trial court's ruling. As previously indicated, the case against Appellant devolved to a credibility contest between the only two witnesses who testified: Cain and Appellant. Yet, the trial court's ruling forbade Appellant from demonstrating Cain's bias to the jury regarding potential civil litigation against him. As a result, the trial court's erroneous ruling reasonably could have affected the result of the trial. See, e.g., Davis, 371 S.C. at 181-82, 638 S.E.2d at 63 (2006) ("Error is only harmless 'when it could not reasonably have affected the result of the trial.'") (quoting Mitchell, 286 S.C. at 573, 336 S.E.2d at 151).

CONCLUSION

For the foregoing reasons, Appellant Corey Gethers respectfully requests reversal of his conviction, and remand for a new trial.

Respectfully submitted,



Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

This 23rd day of April, 2013

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 August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

April 23, 2013

Breen Richard Stevens
Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CORY GETHERS,

APPELLANT

APPELLATE CASE NO. 2011-204886

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Jennifer Ellis Roberts, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 23rd day of April, 2013.

Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 23rd day of April, 2013.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.