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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

REPLY BRIEF OF PETITIONER

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ARUMENT IN REPLY

Showing prejudice on appeal is required. Arguing prejudice from the erroneous evidentiary ruling does not mean the anticipated evidentiary trial error was not properly brought to the judge's attention by way of a contemporaneous objection. Further, cross-examination on a subject matter does not waive an earlier overruled objection on that same subject matter.

The state contends that Detective Bailey's testimony about scheduling interviews with petitioner was "relevant to the process and direction of the investigation and the avoidance indicated a consciousness of guilt." It then argues that defense counsel's "relevance" objection was somehow not sufficient.

It next contends because defense counsel pursued the subject matter of petitioner's alleged avoidance of Bailey on cross-examination by asking her to concede that witnesses do not always respond immediately when contacted that he waived the right to complain when Bailey doubled down on her earlier answer by stating more emphatically that petitioner was the one witness "[w]ho was ducking and dodging me. . ."[1] It finally contends that because petitioner argued the obvious prejudice from the objectionable testimony on appeal -- which he must do to avoid a holding of "[e]rror without prejudice does not warrant reversal" – that he has changed the argument on appeal. Brief of respondent at 6-8. See State v. Huggins, 336 S.C. 200, 204, 519 S.E.2d 574, 576 (1999) *citing* State v. McWee, 322 S.C. 387, 472 S.E.2d 235 (1996).

Respondent's procedural gymnastics after a certiorari grant by this Court respectfully highlights the weakness of its position that Detective Bailey testifying about not hearing back from petitioner for "like 12 or 13 days" until "we *finally met* on February 20th" was relevant and

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[1] The solicitor's question: "How many times did you schedule an interview with him?" was meant to elicit an answer suggesting petitioner was being evasive. The solicitor knew Bailey was not going to answer that petitioner came in immediately and he was always very forthcoming with her. The record in this case puts any assertion to the contrary to rest.

not objectionable even though petitioner was under no obligation to talk to Bailey or even return her phone calls. The import of Bailey's direct examination testimony over objection and her doubling down on it on cross-examination was that petitioner was ducking and dodging her because he was guilty. That was fundamentally unfair since petitioner was under no obligation to come in to the police station to talk to her or even to return her call. R. 213-214. Respondent's brief at 7-8. A defendant is entitled to try and lessen the prejudice from a ruling that evidence will be allowed against him in favor of the state by cross-examining on that same subject matter without reserving his objection. See Rule 17, SCRCrimP.

Respondent cites State v. McDowell, 266 S.C. 508, 515, 224 S.E.2d 889, 892 (1976) as supporting its position -- as well as a couple cases from other jurisdictions -- which hold even a "tenuous" connection between the alleged "avoidance" behavior and the relevance as "guilty mind" evidence is sufficient. Respondent's brief at 13-14. However, as petitioner pointed out to the Court of Appeals on rehearing:

> 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.[2] Appellant was under no obligation to talk to Detective Bailey, and evidence appellant initially chose to remain silent by not meeting Detective Bailey to be interrogated was unfairly used against him as evidence of his guilt.

App. 5-6. Brief of petitioner at 12.

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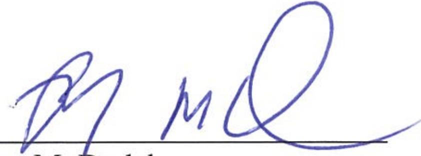
[2] Miranda v. Arizona, 384 U.S. 436 (1966); Doyle v. Ohio, 426 U.S. 610 (1976).

Further, this Court's opinion in State v. Sloan, 278 S.C. 435, 298 S.E.2d 92 (1976), shows our state is not so cavalier in using a citizen's lawful behavior against him or her as "consciousness of guilt" evidence. Again, in Sloan 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 "[t]he 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)." See State v. Sloan, 278 S.C. 435, 439, 298 S.E.2d 92, 94 (1976).

Evidence of flight or of a suicide attempt as "consciousness of guilt" evidence is powerfully damning. The Court has recognized the unfairness of such evidence if it is abused. See State v. Cartwright, 425 S.C. 81, 810 S.E.2d 756 (2018) (strongly limiting the future use of suicide attempt evidence as "consciousness of guilt" evidence); State v. Pagan, 369 S.C. 201, 331 S.E.2d 262 (2006) (failure to stop for a blue light evidence was inadmissible as evidence of flight or guilty knowledge given the lack of an evidentiary nexus). This was a highly unusual case and close case. The intentional use of Detective Bailey to testify that petitioner's lawful behavior in not coming forward in a "timely" manner to her liking was evidence of his guilt was unfair and it was highly prejudicial. State v. Sloan, 278 S.C. 435, 298 S.E.2d 92 (1976); Jenkins v. Anderson, 447 U.S. 231 (1980); Miranda v. Arizona, 384 U.S. 436 (1966).

CONCLUSION

By reason of the arguments in the brief of petitioner, and in this reply brief, 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 29th day of November, 2021.