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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

BYRON LABRON RIVERS,

PETITIONER

APPELLATE CASE NO. 2019-001253

Appeal from Charleston County

Honorable Jennifer B. McCoy, Circuit Court Judge

Opinion No. 2021-UP-395

Petition for Rehearing

Pursuant to Rule 221(a), SCACR, counsel for Byron Labron Rivers petitions the Court for rehearing and respectfully submits that this Court overlooked the fact that Petitioner objected to the case agent, Detective Robert Bailey, testifying about the **result** of the gun shot residue test of the co-defendant, Stacy Green. The objection made, "This gentleman is not an expert in the actual testing of GSR kits," is an objection to allowing the detective to testify about **results** of the GSR test that the detective did not conduct rather than calling as a witness the person who conducted the GSR test. The objection was made shortly before the trial adjourned for the day. (R. pp. 370-382). The first motion made when the trial resumed the following morning was a renewal of the objection to

the detective testifying about the **results** of the GSR test and a motion for a mistrial, specifically citing the right to confront and cross-examine the person who conducted the GSR test. (R. p. 391, line 1 – p. 392, 393, lines 1-8). Counsel respectfully submits that the Confrontation Clause violation is preserved for appellate review.

Additionally, counsel respectfully submits that this Court overlooked the fact that Petitioner did not ask about the **results** of the GSR test done on the co-defendant. Instead, Petitioner cross-examined the detective about whether or not the co-defendant was tested for GSR. The cross-examination was proper and in response to the State's direct examination of the detective about whether a GSR kit was done on Petitioner. Counsel respectfully submits that Petitioner did not open the door to allow the detective to testify about the **results** of the co-defendant's GSR kit. Counsel respectfully seeks rehearing.

The trial judge erred in finding that defense counsel opened the door to allowing a detective to testify about the results of a gunshot residue test from the co-defendant in violation of Petitioner's right to confront witnesses.

The jury found Petitioner guilty of a shooting and robbery of Kirby Fyall and his family and friends at his brother, Sanquan Fyall's apartment. During the direct examination of the case agent, Detective Robert Bailey, the State asked, "Explain to the jury the purpose of GSR, gunshot residue." (R. p. 344, lines 17-18). The detective discussed GSR and then the State asked, "As the case agent were you made aware whether a GSR kit was conducted on Byron Rivers [Petitioner]?" (R. p. 345, lines 13-14). The detective answered, "I was not made aware and I do not believe a GSR kit was conducted on Mr. Rivers." (R. p. 345, lines 15-16). On cross-examination, in response to the questioning about whether a GSR kit was done on Petitioner, trial counsel properly asked if a GSR kit was conducted on the co-defendant Green. (R. p. 360, line 3 – p. 361, line 1).

The detective answered, "Yes, through my understanding of it." (R. p. 360, line 24 – p. 361, line 1). The detective admitted that neither Green's nor Petitioner's clothes were tested for GSR. (R. p. 361, line 2 – p. 362, lines 1-2).

On redirect examination of the detective the State asked, "Do you know whether there was gunshot residue particles on Stacy Green?" (R. p. 369, lines 22-23). The detective answered, "I do not." (R. p. 369, line 24). The State then asked, "If I showed you a document would that help refresh your memory?" (R. p. 369, line 25 – p. 370, line 1). Counsel for Petitioner objected and stated, "This gentleman is not an expert in the actual testing of GSR kits." (R. p. 370, lines 4-5). The judge said, "I'm not sure that he is being offered as an expert –" (R. p. 370, lines 6-7). The State argued, " . . .I'm not. I'm just asking him if he was made aware. I'm trying to refresh his recollection with this document." (R. p. 370, lines 8-10). The judge ruled, "I'll allow it at this point in time." (R. p. 370, line 11). The trial judge erred. If the detective had forgotten whether or not the co-defendant was tested for GSR, the State could have refreshed his memory with the GSR report. The detective, however, should not have been able to testify to the **results** of the GSR test that he did not conduct.

The State then asked the Detective, "I'm showing you what has been marked as identification purposes only as State's exhibit 189. Does that refresh your recollection on whether Mr. Green had gunshot residue particles on him?" (R. p. 370, lines 12-16). The detective answered, "It does and he did not." (R. p. 370, line 18). State's exhibit #189 is listed as the GSR report. (R. p. 390). The objection made that the detective was not an expert in the actual testing of GSR kits is an objection to allowing the detective to testify about **results** of the GSR report rather than calling as a witness the person who conducted the GSR test. The objection was made shortly before the trial adjourned for the day. (R. pp. 370-382).

The first motion made when the trial resumed the following morning was a renewal of the objection to allowing the detective to testify as to the results of the GSR test on the co-defendant, Green, and a motion for a mistrial. (R. p. 391, line 7 – p. 392, 393, 394, lines 1-16). Counsel argued the questioning violated Petitioner's right to confront witnesses and specifically cited Melendez-Diaz v. Massachusetts, 557 U.S. 305, 307, 129 S. Ct. 2527, 2530, 174 L. Ed. 2d 314 (2009). (R. p. 391, lines 11-19; p. 394, lines 7-8). The State argued that Petitioner opened the door by asking if he was the case agent and by asking about GSR. (R. p. 392, lines 1-15; p. 393, lines 10-15). Counsel for Petitioner replied, "I asked if a kit was done. I didn't ask him what any kit showed. And as far as asking him about being a case agent, I asked him about what was already in evidence, was he aware that drugs were collected at that scene. It was already in. I didn't offer any expert opinion about that." (R. p. 393, lines 16-20).

The judge ruled stating:

> I have taken an opportunity to review the case law the defense handed me as well as my recollection of the testimony that was presented on direct, cross, redirect. I am standing by my ruling yesterday. I find the door was opened by Ms. Norris as to the GSR results. The solicitor ten on redirect merely used the document to refresh the lead investigator's memory as to whether or not in fact these results were obtained. And then he testified they were and they were negative. So I don't find an issue with how that transpired. I do find that the door was opened by defense counsel on cross-examination, so I stand by my ruling. But your objection is more than covered for the record, Ms. Norris.

(R. p. 394, line 17 – p. 395, lines 1-4). The judge additionally noted, "And I will say for the record I find the difference between the Melendez-Diaz – and there is another case that came actually a couple years after that that discusses the same issue. In both of those cases it was a little bit different because there was – this was all results that were discussed during the direct of the case agent. Again, I think what differentiates our situation is that it was brought up on cross and so the

door was opened. So that is my position." (R. p. 395, lines 9-17). The fact that GSR was properly raised on cross-examination does not cure the Confrontation Clause violation.

The trial judge erred in finding defense counsel opened the door. The State first questioned the detective about whether Petitioner was tested for GSR. (R. p. 345, lines 13-16). Counsel for Petitioner then properly questioned the detective about whether Green was tested for GSR in order to demonstrate that law enforcement could have tested Petitioner but failed to do so. (R. p. 360, line 3 – p. 361, line 1). Additionally, the crime scene technician, Anita Moore, testified earlier during the trial that she did GSR kits on the deceased, Kirby Fyall, and the co-defendant, Stacy Green. (R. p. 275, line 10 – p. 276, lines 1-23). Moore did not testify about the results of the GSR testing. Defense counsel did not open the door because defense counsel did not question the detective about the **results** of the GSR test. Allowing the detective to testify about the results of the GSR test, without calling the witness who conducted the test, deprives Petitioner of the right to confront witnesses. As noted by counsel for Petitioner, "The problem is, Judge, that I can't cross-examine a man who didn't do the test about what the test is, what it does, what it can show, what it can't show." (R. p. 392, lines 17-19).

In Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009), the case cited by Petitioner at trial, the United States Supreme Court found that the admission of certificates of state laboratory analysts stating that material seized by police and connected to Petitioner was cocaine of a certain quantity violated Petitioner's Sixth Amendment right to confront witnesses. The Court wrote:

> The Sixth Amendment to the United States Constitution, made applicable to the States via the Fourteenth Amendment, Pointer v. Texas, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965), provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him."

> In Crawford[1], after reviewing the Clause's historical underpinnings, we held that it guarantees a defendant's right to confront those "who 'bear testimony' " against him. 541 U.S., at 51, 124 S.Ct. 1354. A witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination. Id., at 54, 124 S.Ct. 1354.

557 U.S. at 309, 129 S. Ct. at 2531.

In State v. McCray, 413 S.C. 76, 773 S.E.2d 914 (Ct. App. 2015), the South Carolina Court of Appeals determined that allowing a DNA analysis expert who simply peer reviewed another DNA expert's report to testify about the DNA results violated the Sixth Amendment's Confrontation Clause guarantee. The testimony "merely served as a conduit for introducing the results of DNA tests that were performed by an expert who did not testify." 413 S.C. at 90, 773 S.E.2d at 922. In McCray the Court of Appeals wrote:

> The Sixth Amendment's Confrontation Clause guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI. In Crawford v. Washington, the U.S. Supreme Court held the admission of testimonial hearsay against an accused violates the Confrontation Clause if (1) the declarant is unavailable to testify at trial and (2) the accused has had no prior opportunity to cross-examine the declarant. 541 U.S. 36, 59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). "The touchstone for determining whether an expert is giving an independent judgment or merely acting as a transmitter for testimonial hearsay is whether an expert is applying his training and expertise to the sources before him, thereby producing an original product that can be tested through cross-examination." United States v. Palacios, 677 F.3d 234, 243 (4th Cir.2012) (quoting United States v. Johnson, 587 F.3d 625, 635 (4th Cir.2009)) (internal quotation marks omitted).

413 S.C. at 90, 773 S.E.2d at 921–22.

In the present case, admission of the detective's testimony that a GSR test for the co-defendant was negative violates the Petitioner's Sixth Amendment right to confront witnesses in the same way that the admission of the certificates in Melendez-Diaz and the admission of the

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[1] 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

testimony from the DNA expert who did not conduct the DNA test in McCray violates the Sixth Amendment right to confront witnesses. The detective was merely acting as a transmitter for testimonial hearsay. Unlike the testimony in McCray, however, the admission of the detective's testimonial hearsay that the co-defendant was negative for GSR was not harmless.

In State v. Gracely, 399 S.C. 363, 375, 731 S.E.2d 880, 886 (2012), the South Carolina Supreme Court wrote:

> A violation of the Confrontation Clause is not per se reversible but is subject to a harmless error analysis. Van Arsdall, 475 U.S. 673, 680, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). Whether such an error is harmless in a particular case depends upon a host of factors.... The factors include the *importance of the witness's testimony* in the prosecution's case, whether the testimony was *cumulative,* the presence or absence of evidence *corroborating* or contradicting the testimony of the witness on material points, the *extent of cross examination* otherwise permitted, and, of course, the *overall strength* of the prosecution's case. Id. at 684, 106 S.Ct. 1431 (emphasis added). *See* State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994) ("The list of factors as set out in Van Arsdall is not exhaustive.").

The detective's testimony that the co-defendant was negative for GSR was very important in the prosecution's case. The defense theory was that the co-defendant was the shooter. Counsel for Petitioner told the jury in opening statement, "Byron Rivers was at [address of Sanquan Fyall's apartment] for a deal. In his possession was a 40 caliber handgun, a Walther PPS that never fired a shot." (R. p. 60, lines 13-15). The night of the shooting a Walther firearm was found on the ground by a trash can about eight yards from Petitioner. (R. p. 187, lines 12-22). The Walther firearm, State's Exhibit #126, was a 40 caliber Smith and Wesson. (R. p. 428, line 2 – p. 429, lines 1-8). The Walther gun had one round in the chamber and seven rounds in the magazine. (R. p. 230, lines 8-13). Counsel for Petitioner also stated in opening that, "In this particular case as we hear so often the hand of one is not the hand of all. In this particular case the hand of one is the hand of one and that hand belongs to Stacy Green." (R. p. 60, lines 18-21). The State argued in closing, "And Stacy Green's DNA was not on the murder weapon. He didn't have GSR particles."

(R. p. 529, lines 8-9). The Hi-Point 9 mm linked to shell casings found at the apartment was not recovered by police on the night of the shooting. Instead, that gun was provided to police the next day by a member of the Fyall family. The bullets submitted for testing were too small to have been fired by the Walther 40 caliber Smith and Wesson found close to Petitioner. (R. p. 466, lines 1-3). The negative result of the GSR test from the co-defendant was an important part of the State's case. The error in allowing the testimonial hearsay in violation of the right to confrontation was not harmless.

In affirming the convictions this Court wrote:

> Byron Labron Rivers appeals his convictions for murder, first-degree burglary, possession of a weapon during the commission of a violent crime, two counts of attempted murder, and three counts of armed robbery. On appeal, Rivers argues the trial court erred in finding he opened the door to a witness's testimony regarding the results of his codefendant's gunshot residue (GSR) test and this testimony violated the Confrontation Clause. Rivers's issue is not preserved for review because Rivers failed to contemporaneously raise the Confrontation Clause issue to the trial court. Rather, Rivers only argued the witness was "not an expert in the actual testing of GSR kits." Accordingly, we affirm pursuant to Rule 220(b), SCACR, and the following authorities: State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground."); State v. Lynn, 277 S.C. 222, 226, 284 S.E.2d 786, 789 (1981) ("Failure to contemporaneously object to the question now advanced as prejudicial cannot be later bootstrapped by a motion for a mistrial.").

The State, Respondent, v. Byron Labron Rivers, Petitioner., No. 2019-001253, 2021 WL 5232315, at *1 (S.C. Ct. App. Nov. 10, 2021).

Counsel respectfully submits that although trial counsel did not initially use the words "Confrontation Clause violation," the objection that the detective was "not an expert in the actual testing of GSR kits" clearly referenced the fact that by allowing the detective to testify about **results** of the GSR test that the detective did not conduct, the judge violated Petitioner's right to confront and cross-examine the person who performed the GSR test. Counsel respectfully submits

that the Confrontation Clause violation is preserved for appellate review. Additionally, the objection was made shortly before the trial adjourned for the day. (R. pp. 370-382). The first motion made when the trial resumed the following morning was a renewal of the objection to the detective testifying about the **results** of the GSR test and a motion for a mistrial, specifically citing the right to confront and cross-examine the person who conducted the GSR test. (R. p. 391, line 1 – p. 392, 393, lines 1-8). Trial counsel specifically cited Melendez-Diaz v. Massachusetts, 557 U.S. 305, 307, 129 S. Ct. 2527, 2530, 174 L. Ed. 2d 314 (2009). (R. p. 391, lines 11-19; p. 394, lines 7-8). Counsel respectfully submits that the Confrontation Clause violation is preserved for appellate review.

In a footnote this Court wrote:

> Even if the issue were preserved, the trial court did not err in finding Rivers opened the door to the testimony because he asked the witness whether his codefendant was tested for GSR. See State v. Page, 378 S.C. 476, 483, 663 S.E.2d 357, 360 (Ct. App. 2008) ("Whether a person opens the door to the admission of otherwise inadmissible evidence during the course of a trial is addressed to the sound discretion of the trial [court]."); State v. Douglas, 369 S.C. 424, 429-30, 632 S.E.2d 845, 848 (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."); *State v. Beam*, 336 S.C. 45, 52, 518 S.E.2d 297, 301 (Ct. App. 1999) ("[A defendant] cannot complain about the admission of evidence where he opened the door to the evidence."); State v. Stroman, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984) ("Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though [the] latter evidence would be incompetent or irrelevant had it been offered initially." (alteration in original) (quoting State v. Albert, 277 S.E.2d 439, 441 (N.C. 1981))).

The State, Respondent, v. Byron Labron Rivers, Appellant., No. 2019-001253, 2021 WL 5232315, at *1 (S.C. Ct. App. Nov. 10, 2021). Counsel respectfully submits that trial counsel did not open the door to allow the detective to testify about the **results** of the co-defendant's GSR kit because Petitioner did not ask about the **results** of the GSR test done on the co-defendant. Instead, Petitioner cross-examined the detective about whether or not the co-defendant was tested for GSR.

The cross-examination was proper and in response to the State's direct examination of the detective about whether a GSR kit was done on Petitioner. There is a difference between asking the detective whether a GSR test was done and asking the detective about the results of the GSR test. Allowing the detective to testify about the **results** of the co-defendant's GSR kit violated the Confrontation Clause.

Counsel respectfully submits that this Court overlooked the fact that the objection made and then renewed preserved the Confrontation Clause issue for appellate review. Counsel additionally submits that this Court overlooked the fact that trial counsel did not open the door to allowing the State to ask about GSR results for a co-defendant by asking about whether a GSR test was done on the co-defendant. Counsel respectfully seeks rehearing.

Respectfully Submitted,

KATHRINE H. HUDGINS
Appellate Defender

This 29th day of November, 2021.

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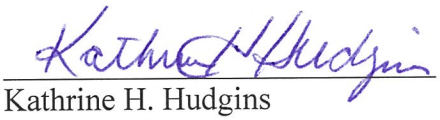
PETITIONER

APPELLATE CASE NO. 2019-001253

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-entitled case has been served upon Tommy Evans, Jr. Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and Byron Labron Rivers, #380415, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 29th day of November, 2021.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER