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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Charleston County
Honorable Jennifer B. McCoy, Circuit Court Judge

Opinion No. 2021-UP-395 (S.C. Ct. App. Filed November 10, 2021)

Lower Court Case No. 2017-GS-10-02104

THE STATE,

RESPONDENT,

V.

BYRON LABRON RIVERS,

PETITIONER.

APPELLATE CASE NO. 2022-000054

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in finding that the Confrontation Clause objection was not preserved for appellate review when, at trial, counsel objected to allowing a detective to testify to the results of a gun-shot residue test from the co-defendant without calling the witness who conducted the test, stating that the detective was not an expert in the actual testing of GSR kits and then specifically stating that the testimony as to the results of the test violated Petitioner's right to confront witnesses?

2. Did the Court of Appeals err in finding that Petitioner opened the door to allowing a detective to testify to the results of a gun-shot residue test from the co-defendant without calling the witness who conducted the test?

ARGUMENTS IN REPLY

1. **The Court of Appeals erred in finding that the Confrontation Clause objection was not preserved for appellate review when, at trial, counsel objected to allowing a detective to testify to the results of a gun-shot residue test from the co-defendant without calling the witness who conducted the test, stating that the detective was not an expert in the actual testing of GSR kits and then specifically stating that the testimony as to the results of the test violated Petitioner's right to confront witnesses**

At trial and on appeal Petitioner objected to Detective Bailey testifying about the **results** of a gun-shot residue test from the co-defendant as a violation of the Confrontation Clause. The trial judge ruled on the objection based on the Confrontation Clause. The issue is preserved for appellate review.

On redirect examination of Detective Bailey 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 first objected stating "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. The objection that the detective was not an expert in the actual testing of GSR kits draws the distinction between permissible general questioning about GSR testing and if certain individuals were tested and impermissible questioning about the **result** of any GSR test determined by an expert. 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 crime

scene technician, Anita Moore, had already testified 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, however, did not testify about the **results** of the GSR testing. The detective 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 to allowing the detective, who did not conduct the GSR test, to testify about the **results** of the co-defendant's GSR test was made shortly before the trial adjourned for the day. (R. pp. 370-382).

The very first thing the judge heard the following morning before the trial resumed 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 said, "Your Honor, just - - just for clarification purposes, we renew our objection to Your Honor's ruling allowing the detective to testify to gunshot residue - - " (R. p. 391, lines 7-9). The judge asked, "The result he received?" (R. p. 391, line 10). Counsel answered, " - - to conclusions. I submit that number one, he is not an expert in that that and it is the very definition of a violation of this young man's right to confront and cross-examine witnesses. It is a little different than Melendez-Diaz v. Massachusetts. But that is the case where the Supreme Court said you can't have a drug certificate from an analyst saying it is drugs and present it through somebody else. We have got a right to question and challenge that." (R. p. 391, lines 11-19).

Counsel specifically 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). Counsel for Petitioner argued:

> 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. And I guarantee that if we put a gunshot residue expert on that witness stand I can ask the question – if I stood here right now and fired a weapon is it guaranteed I would have gunshot residue on me – and the answer would be no.
>
> This young man is entitled to question that evidence, rather than just have someone who said he didn't even remember read a report from somebody else doing a test saying yes there is not gunshot residue on this man.

(R. p. 392, line 17 – p. 393, lines 1-2). Counsel for Petitioner continued, "We just object. I think that took away this young man's right to a fair trial, to confront and cross-examine the witnesses. And if we don't fix it now, in my experience, my opinion, this thing is going to come back at us if he gets convicted." (R. p. 393, lines 4-8).

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). Defense counsel handed a copy of the Melendez-Diaz case to the judge. (R. p. 394, lines 1-14). The Confrontation Clause issue was raised to the trial judge.

The judge ruled on the Confrontation Clause issue 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 then 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 Confrontation Clause issue was raised to the trial judge and she ruled that the testimony was admissible because the defense opened the door. The error in this ruling is discussed in issue two below. The Confrontation Clause issue was preserved for appellate review.

The Court of Appeals, however, found the issue unpreserved writing:

> 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.").

State v. Rivers, Op. No. 2021-UP-395 (S.C.Ct.App. filed Nov. 10, 2021). (App. p. 1).

The record reflects that Petitioner did not **only** argue that the detective was not an expert in the actual testing of GSR kits. Although trial counsel did not initially use the words "Confrontation Clause violation," viewing the context in which the objection was made that the detective was "not an expert in the actual testing of GSR kits" the objection 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. Critically, at the first opportunity after the ruling, Petitioner specifically objected to the testimony as a violation of the Confrontation Clause. (R. p. 391, line 7 – p. 392, 393, 394, lines 1-16). The finding by the Court of Appeals that the Confrontation Clause issue was not preserved for review is not supported by the record.

Respondent argues that, "It is clear in the record that Petitioner's counsel never argued that this was a violation of the confrontation clause." (Return, p. 12). Respondent additionally argues that, "The confrontation clause was only raised by Appellant counsel, never before the trial judge." (Return, p. 12). Respondent's arguments are not supported by the record that shows that Petitioner specifically argued that the testimony violated Petitioner's right to confront and cross-examine witnesses and specifically cited Melendez-Diaz and provided the judge with a copy of the case. (R. pp. 391 – 394).

"Preservation rules are intended to ensure that appellate courts review considered decisions of our trial courts and that issues are not being raised for the first time on appeal. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Their purpose is not to sabotage attorneys' efforts to bring issues before the appellate courts, particularly where, as here, it was clear to all concerned that Jones's counsel continued to object to the denial of his motion to suppress." State v. Jones, 435 S.C. 138, 145, 866 S.E.2d 558, 561 (2021). The

Confrontation Clause issue is not being raised for the first time on appeal. Like Jones, it was clear to all concerned that the objection was based on a violation of the Confrontation Clause. The State argued that defense counsel opened the door to admission. The trial judge ruled on the issue finding that defense counsel opened the door to the admission of the testimony. After Petitioner specifically cited both the right to confront witnesses and Melendez-Diaz, the trial judge said, "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. 395, lines 1-4). The issue is not being raised for the first time on appeal. The issue is preserved for appellate review.

2. The Court of Appeals erred in finding that Petitioner opened the door to allowing a detective to testify to the results of a gun-shot residue test from the co-defendant without calling the witness who conducted the test.

Counsel did not open the door or waive the Confrontation Clause objection to the admission of the **results** of the co-defendant's GSR test. The State first questioned the crime scene technician, Anita Moore, about who she tested for GSR. (R. p. 275, lines 17-20). She testified that she tested the deceased, Kirby Fyall, and the co-defendant, Stacy Green. (R. p. 275, line 10 – p. 276, lines 1-23). The State did not question Moore about the **results** of the GSR testing. Instead, the State, on redirect examination, questioned Detective Bailey about the **results** of the GSR test done on the co-defendant, Green asking, "Do you know whether there was gunshot residue particles on Stacy Green?" (R. p. 369, lines 22-23). Petitioner objected. (R. p. 370, lines 4-5).

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 State initiated the questioning about GSR. During the direct examination of the detective 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 done 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). The cross-examination about whether a GSR kit was done on the co-defendant was proper, in response to the direct examination about whether a GSR kit was done on Petitioner and did not open the door to allow the State to question the detective about the **results** of the GSR test on the co-defendant.

As discussed above in issue one, the judge ruled on the Confrontation Clause issue 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 then 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 trial judge erred. Defense counsel's cross-examination did not open the door to admit the results of the co-defendant's GSR test when the State, on direct, was the first to ask if a GSR kit was done on Petitioner. The State's re-direct examination about the results went too far. There is a difference between asking if a test was done and asking about the results of the test.

The Court of Appeals, however, in a footnote, found the door was opened writing:

> 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))).

State v. Rivers, Op. No. 2021-UP-395 (S.C.Ct.App. filed Nov. 10, 2021). (App. p. 1). The Court of Appeals erred. Defense counsel asked the detective, on cross, whether the co-defendant was tested in response to the State asking, on direct, whether Petitioner was tested. The cross-examination did not open the door to the testimony about the results.

Respondent's reliance on United States v. Lopez-Medina, 596 F.3d 716, 730 (10th Cir. 2010), is misplaced. In Lopez-Medina the trial judge admitted hearsay statements from a

confidential informant on redirect after defense counsel asked the officer about how he came to know that the pickup was a suspected truck. The Tenth Circuit Court of Appeals wrote:

> The government requested a sidebar conference after defense counsel asked Officer Johnson how he "[came] to know that that pickup truck was a suspected truck[.]" (R. Supp. Vol. I, Doc. 185 at 84.) Defense counsel explained to the court: "I think, Your Honor, [the government is] worried that I am going to bring in the confidential informant information. That's my full intention. I don't care what door we open. If I open up a door, please feel free to drive into it. But I am going to explore the entire case." (*Id.* at 85–86.) It is clear from this statement that defense counsel intentionally relinquished his (or rather, his client's) confrontation right through his questioning of Johnson. This is not a case of ignorance or inadvertence and we do not decide what rule would apply in that context.

United States v. Lopez-Medina, 596 F.3d 716, 731 (10th Cir. 2010). In contrast, defense counsel in the present case in no way relinquished or waived her client's confrontation right through her questioning the detective about whether the co-defendant had been tested for GSR **after**, the State first questioned the detective about whether Petitioner had been tested. As noted by the Court in Lopez-Medina:

> The determination that a particular right has been waived "does not end our inquiry." Aptt, 354 F.3d at 1281. The procedures and circumstances required for effective waiver depend on the right at stake. Id. Similar to waiver by stipulating to the admission of evidence, counsel in a criminal case may waive a client's Sixth Amendment right of confrontation by opening the door, "so long as the defendant does not dissent from his attorney's decision and so long as it can be said that the attorney's decision was a legitimate trial tactic or part of a prudent trial strategy." *Id.* at 1282 (quotations omitted); see also United States v. Dazey, 403 F.3d 1147, 1169 (10th Cir.2005) ("Defense counsel's stipulation to admission of evidence effectively waives the defendant's confrontation rights unless the defendant can show that the waiver constituted ineffective assistance of counsel.").

596 F.3d at 731. In the present case counsel did not waive Petitioner's right of confrontation. Counsel did not open the door to the admission of the results of the GSR test from the co-defendant.

As argued in the petition for writ of certiorari, 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 testimony from the DNA expert who did not conduct the DNA test in State v. McCray, 413 S.C. 76, 773 S.E.2d 914 (Ct. App. 2015), violates the Sixth Amendment right to confront witnesses. The detective was merely acting as a transmitter for testimonial hearsay. As discussed in the petition for writ of certiorari, 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.

CONCLUSION

Based on the above arguments, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

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Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of February, 2022.