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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions

Appellate Case No. 2021-000457

The Honorable Craig Brown, Circuit Court Judge

The State of South Carolina.....Respondent,

v.

Christopher P. Cooper.....Appellant.

INITIAL REPLY BRIEF OF APPELLANT

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INTRODUCTION

Appellant respectfully submits this reply brief addressing Respondent's arguments as to issues I and III. Appellant does not waive any argument as to issue II.

ARGUMENTS

- I. **The trial court erred in not allowing Appellant to offer evidence that the purported victim approached Appellant's brother and requested money when that evidence was relevant and was admissible to impeach her testimony pursuant to Rule 404(b), SCRE.**

In its response, Respondent argues the evidence concerning the communications between the complainant and Appellant's brother are merely "collateral" to the main issues in the case. Appellant respectfully disagrees. The issue of these discussions with Appellant's brother was material to the case because it at least raised the specter that the complainant was willing to change her testimony in exchange for money. It is not relevant that she had not done so by the time these discussions came to light. The relevance is in her decisions to continue communicating with Appellant's brother during the pendency of the State's case against his brother and that the discussions ultimately involved the exchange of money. This fact is directly relevant to her credibility in the case. *See State v. Galloway*, 263 S.C. 585, 593, 211 S.E.2d 885, 889 (1975) ("The true question is one of relevance. If the exclamation attributed to Mrs. Church by her co-workers is inconsistent with her testimony on a disputed issue in the case, then the jury should

have the benefit of the former in determining the weight to be accorded the latter.”)

South Carolina courts have long recognized that considerable latitude is allowed in cross-examination of witnesses for potential bias. *State v. Clark*, 315 S.C. 478, 445 S.E.2d 633 (1994); *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986) (a defendant demonstrates a Confrontation Clause violation where he is prohibited from "engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias...from which jurors...could...draw inferences relating to the reliability of the witness."); *State v. Gracely*, 399 S.C. 363, 731 S.E.2d 880 (2012) (reversing conviction when defense counsel not allowed to cross-examine witnesses regarding possible bias). The trial court erred by excluding this evidence because the evidence directly pertained to the complainant's reliability and Appellant is entitled to a new trial.

III. The trial court erred in allowing the complainant to testify that she recognized Appellant's voice from the bonding hearing since the identification procedure was unnecessarily suggestive and conducive to irreparable misidentification.

In its response, the Respondent argues that 1) the issue is not properly preserved, and 2) Appellant's claim should fail on its merits. Respondent's Brief, pp. 39, 42. Respectfully, Appellant argues that the issue is meritorious and that the court should address the claim.

A criminal defendant may be deprived of due process of law by an identification procedure which is unnecessarily suggestive and conducive to irreparable mistaken identification. *Stovall v. Denno*, 388 U.S. 293 (1967). An in-court identification of an

accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification. *Manson v. Brathwaite*, 432 U.S. 98 (1977) (citing *Simmons v. United States*, 390 U.S.377 (1968)); *State v. Stewart*, 275 S.C. 447, 272 S.E.2d 628 (1980).

The United States Supreme Court has developed a two-prong inquiry to determine the admissibility of an out-of-court identification. *Neil v. Biggers*, 409 U.S. 188 (1972). First, "[a] court must first determine whether the identification process was unduly suggestive... [It] next must determine whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed." *Curtis v. Commonwealth*, 11 Va.App. 28, 396 S.E.2d 386, 388 (1990) (citing *Neil v. Biggers*, 409 U.S. at 198). In *State v. Simmons*, 308 S.C. 80, 417 S.E.2d 92 (1992), this Court remanded for an identification hearing to determine whether the identification procedure in that case was so tainted as to be unreliable when the witness viewed the suspect at a bond hearing.

There is no question but that a bond hearing is a highly suggestive environment since a defendant, here the Appellant, has already been arrested and identified as a key suspect in a case. By allowing the complainant to make an identification of her assailant based on the voice of the suspect she heard at the bond hearing, the court allowed an identification into court that was secured by an unduly suggestive procedure creating a substantial likelihood of misidentification. The error preservation issue raised by Respondent should be discounted in light of the trial court's appropriation of the argument, including not even requiring the State to state

its position on the record, and his failure to allow trial counsel to make the proper objections. The South Carolina Supreme Court has overlooked procedural barriers when it is clear from the record that any objection would have been futile. *State v. Pace*, 316 S.C. 71, 447 S.E.2d 186 (1994). Such is the case here. Appellant's right to due process was violated by the admission of this improper evidence and this Court should grant him a new trial.

CONCLUSION

This Court should reverse Appellant's convictions and sentence and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Counsel hereby certifies she has served a copy of this initial reply brief on William Blich of the South Carolina Attorney General's Office via email on this date, April 6, 2022.

/s/ Elizabeth Franklin-Best