STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Sumter County

Honorable George M. McFaddin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DONALD RAY RICHBURG,

APPELLANT

APPELLATE CASE NO 2019-001007

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

STATEMENT OF ISSUES ON APPEAL

1.

Whether the trial judge erred in ruling that the video recording of Appellant's arrest was admissible where Appellant's girlfriend and child were present and the officers threatened to arrest Appellant's girlfriend and send their child to DSS if Appellant did not come out of hiding and therefore its probative value was substantially outweighed by the danger of unfair prejudice?

2.

Whether the trial judge erred in prohibiting defense counsel from cross-examining the lead investigator regarding Appellant's second statement in which he admitted to being present at the scene of the shooting where the state introduced Appellant's first statement in which he denied being present at the scene and Appellant's co-defendant testified at trial that Appellant was present at the scene but not involved in the shooting which was consistent with Appellant's second statement?

STATEMENT OF THE CASE

Appellant was indicted by the Sumter County grand jury for four counts of assault and battery in the first degree and one count of discharging a firearm into a dwelling. R. 301. Appellant's trial was held before the Honorable George M. McFaddin and a jury from June 10 – 12, 2019. R. 1. Appellant was represented by Jason Bridges and the state was represented by Tyler Brown. R. 1.

The jury found Appellant guilty as charged on all five counts. R. 287. The judge sentenced Appellant to ten years imprisonment on each count, all sentences to run concurrently. R. 295.

This appeal follows.

STANDARD OF REVIEW

In reviewing a trial court's ruling on the admissibility of evidence, appellate courts recognize that the trial judge has considerable latitude in this regard and will not disturb such rulings absent a prejudicial abuse of discretion. State v. Whitner, 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012); State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Whitner, 399 S.C. at 557, 732 S.E.2d at 866.

STATEMENT OF FACTS

On June 17, 2018, Evelyn Brinson was awakened around 4:00 a.m. by the sound of gunshots outside her home. R. 54, l. 4 – 55, l. 24. Brinson got up to make sure everyone[1] inside the house was okay, and then she called 911. R. 54, l. 24 – 55, l. 4. Brinson's grandson Jeremy was also in the house sleeping at the time of the shooting. R. 65, l. 9 – 67, l. 8. After the shots stopped, Jeremy ran outside and claimed that he recognized the vehicle leaving the area as Ronnie Smith's[2] white truck. Jeremy said he knew that it was Smith's truck because of the way it sounded. R. 67, l. 22 – 68, l. 23.

Jeremy testified that he had been having a "beef" with Smith for about a year prior to the shooting. R. 73, l. 17 – 74, l. 25. Jeremy also said that the afternoon prior to the shooting he was out driving and was followed by Smith in Smith's white truck. R. 70, ll. 3 – 20. Jeremy claimed that Appellant was in the passenger seat of Smith's truck at that time. R. 71, ll. 17 – 24.

Orlando McCray, a trooper with the South Carolina Highway Patrol, initiated a traffic stop[3] on a white truck about thirty minutes prior to the shooting. The reason for the traffic stop was suspicion of DUI. R. 145, l. 16 – 147, l. 18. McCray approached the passenger side of the vehicle at the time of the stop and shined his flashlight on the passenger's face. R. 152, ll. 8 – 13. Approximately two months later, Investigator Stewart contacted McCray and asked him if he could pick the passenger of the white truck out of a six-person photo lineup. McCray identified Appellant as the passenger in the white truck. R. 152, l. 18 – 156, l. 15.

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1 There were a total of four people inside the home at the time of the shooting: Barry Brinson, Evelyn Brinson, Jeremy Brinson, and Summer Holiday. R. 54, ll. 1 – 15.

2 Ronnie Smith was Appellant's co-defendant.

3 McCray was in the passenger seat of the highway patrol cruiser because he was training another officer who was driving at the time that they initiated the stop. Ultimately, Smith, who was the driver of the truck, was issued a warning ticket and allowed to leave.

Randall Stewart, with the Sumter County Sheriff's Office, was the lead investigator assigned to the shooting. R. 171, l. 1 – 172, l. 16. After speaking with Jeremy Brinson, Ronnie Smith was developed as a possible suspect. R. 193, ll. 6 – 20; R. 199, ll. 16 – 24. Stewart interviewed Smith, who implicated Appellant as being the driver during the shooting. State's Ex. 85 (video recording of Smith's statement on file with this Court). Smith admitted that he was the shooter. R. 230, l. 21 – 231, l. 6. Stewart also took a written statement from Appellant in which Appellant stated that he was with Smith earlier in the day but denied being with Smith at the time of the shooting. R. 202, l. 17 – 211, l. 11. After his arrest, Appellant gave a second statement in which he told Stewart that he was with Smith during the shooting, but he did not know that Smith was going to shoot. The state chose not to introduce this statement at trial. R. 216, l. 11 – 222, l. 5.

ARGUMENT

1.

The trial judge erred in ruling that the video recording of Appellant's arrest was admissible because Appellant's girlfriend and child were present and the officers threatened to arrest Appellant's girlfriend and send their child to DSS if Appellant did not come out of hiding and therefore its probative value was substantially outweighed by the danger of unfair prejudice.

Relevant Facts

After Investigator Stewart obtained arrest warrants for Appellant, he was unable to make contact with him. Specifically, Stewart maintained that Appellant would not answer his phone and Stewart also attempted to contact members of Appellant's family which were unsuccessful. R. 212, l. 20 – 214, l. 8. Because Stewart was unable to effectuate the arrest of Appellant, the warrants were turned over to the Fugitive Task Force Team. R. 214, ll. 9 – 15.

Ronald Dodson, a member of the Fugitive Task Force Team, testified that he was able to locate Appellant on August 17, 2018. R. 158, l. 21 – 159, l. 19. Dodson recalled that he received information that Appellant was staying at a hotel in Sumter and he and several other officers responded to the hotel in an attempt to arrest Appellant. R. 161, l. 12 – 162, l. 6. One of the officers who responded to the hotel was wearing a body camera which showed the arrest of Appellant. R. 162, l. 12 – 163, l. 3; State's Ex. 7 (body camera footage of Appellant's arrest on file with this Court).

The body camera footage showed multiple armed officers approaching a hotel room and knocking on the door. State's Ex. 7 at 0:00 – 2:00. While knocking on the door, one of the officer's said: "Courtney, open the door. We know you're in there. Open the door so we don't

have to call DSS." State's Ex. 7 at 2:00 – 2:30. Courtney was Appellant's girlfriend and the mother of his son. Both Courtney and Appellant's son were present inside the hotel room when the officers arrived.

Shortly after the officers begin demanding that Courtney open the door, she came out of the room with a young child in her arms. State's Ex. 7 at 3:15. Courtney stated that she was getting ready to bathe the child and the bath water was running. When asked whether anyone was in the hotel room with her, she said no. State's Ex. 7 at 3:20. One of the officers then stated to Courtney that if they found Appellant inside the hotel room that they would arrest her and take the child to DSS. State's Ex. 7 at 3:30. Courtney maintained that Appellant was not inside the hotel room and the officer's continued to threaten her with arrest and taking her child. The officer's had Courtney sit down outside while they entered the room. State's Ex. 7 at 3:30 – 4:15.

When the officers entered the hotel room, they could be heard announcing their presence and demanding that Appellant come out with his hands up. State's Ex. 7 at 4:15 – 5:10. One of the officer's then came back outside and told Courtney that Appellant was "in the ceiling" which Courtney denied. State's Ex. 7 at 5:15. The officer again told Courtney that he was going to get Appellant out of the room and then stated: "When I get him, you're going to jail and your baby's going to DSS." State's Ex. 7 at 5:15 – 5:25.

The officer who was threatening Courtney ordered her to stand up, go inside the room and sit down in a chair. When they entered the hotel room, another officer could be heard saying "lock her up" and the officer who was threatening Courtney responded: "Oh she's going to jail." State's Ex. 7 at 5:30 – 5:50. This same officer then asked Courtney: "Is that [Appellant's] baby"

while pointing his finger at the child. Courtney responded that the child was Appellant's child. State's Ex. 7 at 5:50 – 5:55.

At that time, the officer who had been threatening Courtney turned to the other officers who can be seen congregated at the bathroom door, and said: "Hey, tell [Appellant] that that baby is going to DSS if he doesn't come out." State's Ex. 7 at 5:55 – 5:58. Immediately, another officer yelled out: "The baby is going to DSS if you don't bring your ass down now." State's Ex. 7 at 5:58 – 6:03. Shortly after this Appellant can be seen emerging from the bathroom and being put in handcuffs by the officers. State's Ex. 7 at 6:30 – 7:15.

Defense counsel made a pretrial motion to exclude the body camera footage of Appellant's arrest under Rule 403, SCRE because the probative value of the video was substantially outweighed by the danger of unfair prejudice to Appellant. Defense counsel specifically pointed out that the body camera footage showed the officers talking about taking Appellant's child and turning him over to DSS and arresting his girlfriend. R. 24, l. 19 – 26, l. 2.

The assistant solicitor responded that the body camera footage showed evidence of flight which created an inference of Appellant's guilt. R. 26, l. 5 – 9. Defense counsel argued that the only probative value in the video was to show that Appellant was ultimately arrested after he initially fled. No evidence of the shooting was recovered during the arrest of Appellant and the video was extremely prejudicial due to its content. R. 27, l. 18 – 28, l. 15.

The judge ruled that the body camera footage was admissible. R. 29, ll. 7 – 9. The body camera footage was introduced during Dodson's testimony and was played to the jury over defense counsel's renewed objection. R. 162, l. 20 – 163, l. 23.

Discussion

Under Rule 403, SCRE, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." "Unfair prejudice means an undue tendency to suggest [a] decision on an improper basis." State v. Spears, 403 S.C. 247, 253, 742 S.E.2d 878, 881 (Ct. App. 2013).

The trial judge erred in admitting the video of Appellant's arrest over defense counsel's objection. The video's probative value consisted solely of showing the defendant's flight. However, the video showed much more than the defendant's flight. The video showed law enforcement officers threatening to arrest Appellant's girlfriend for "harboring" when she told the officers on the scene that Appellant was not inside the hotel room. Even more significantly, it showed the officers threatening to take Appellant's child and place him in DSS custody. The officers went so far as to make a direct threat to Appellant when one of them loudly yelled: "The baby is going to DSS if you don't bring your ass down now." State's Ex. 7 at 5:58 – 6:03.

In State v. Corns, 310 S.C. 546, 426 S.E.2d 324 (Ct. App. 1992), this Court held that the defendant's statements to law enforcement were involuntarily made and inadmissible. The reason the Corns Court found the defendant's statements to be inadmissible was because his statements were made in response to the officers threatening to arrest his wife and take his children to DSS. Id. at 552, 426 S.E.2d at 327. The Court determined that the threats made against the defendant's wife and children amounted to improper influence rendering his confession involuntary. Id.

Although Corns dealt with the admissibility of a defendant's statement, the opinion highlights the problematic nature of officer's making threats against a defendant's family. To the extent that a threat against a defendant's family may render his statements in response to such

a threat inadmissible, so to should a video recording showing these threats being made be closely scrutinized under Rule 403, SCRE. While Appellant did not make any incriminating statements on the video, he did apparently heed the officer's demands only in response to those threats being made to him. See State's Ex. 7.

Our Courts have held that while evidence of flight may be admissible to show a guilty conscience, it is not necessarily always admissible. See State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006) (recognizing that evidence of flight may be used to show a guilty conscience but holding that defendant's failure to stop for a blue light was inadmissible because it was not motivated by the outstanding murder charge); State v. Martin, 403 S.C. 19, 742 S.E.2d 42 (Ct. App. 2013) (evidence that Martin gave false information to police was inadmissible because there was no nexus between the false information and the charged crime).

However, the objection made here was not to evidence of Appellant's flight. Evidence of flight is normally just testimony that the defendant was arrested later elsewhere. The objection was to a video of his arrest which contained extremely prejudicial information regarding the arrest of his girlfriend and the placing of his child into DSS custody. R. 24, l. 19 – 26, l. 2. There was no contention by the defense that the state could not present testimony regarding Appellant's evasive behavior after warrants were issued for his arrest. However, the state cannot introduce evidence where the probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE. "Under our system of justice, a conviction must be based upon evidence of the offense for which the accused is on trial rather than prior criminal or immoral acts." State v. Gore, 283 S.C. 118, 120, 322 S.E.2d 12, 13 (1984).

In State v. Cheeseboro, 346 S.C. 526, 549, 552 S.E.2d 300, 312 (2001), the Supreme Court found that the admission of song lyrics written by the defendant while he was incarcerated

were inadmissible character evidence. The Court found that the song lyrics regarding leaving "no prints" and "bodies left in a pool of blood" were vague and had minimal probative value. Furthermore, the admission of the song lyrics had a substantial danger of unfair prejudice because it tended to suggest that the defendant had a general bad and violent character. The Court went on to find that the admission of this improper character evidence was harmless because there was other properly admitted evidence of the defendant's violent character. Id. at 550, 552 S.E.2d at 313.

The extremely prejudicial nature of the content of the video lies primarily in the insinuation that Appellant was abandoning his son and girlfriend. The jury could view the video as showing Appellant to be a bad father and boyfriend which was of course not a proper consideration for the jury. The video was wholly unnecessary and a gratuitous attack on Appellant's character while providing minimal probative value. It showed that Appellant was willing to allow his girlfriend to be arrested and his child taken into DSS custody instead of surrendering to the police himself.

The question before the jury was whether Appellant knowingly participated in the shooting of the Brinson's house. The jury did not need to consider whether Appellant was a "good" or "bad" father to his child, or significant other to his girlfriend. However, the video introduced this exact consideration into the jury's deliberations by showing the presence of Appellant's child and the officer's threatening to take the child into DSS custody. The trial judge erred in admitting the body camera footage of the hotel scene with his girlfriend and child and Appellant's arrest because its probative value was substantially outweighed by the danger of unfair prejudice. Appellant's convictions should be reversed. See State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001); State v. Corns, 310 S.C. 546, 426 S.E.2d 324 (Ct. App. 1992).

2.

The trial judge erred in prohibiting defense counsel from cross-examining the lead investigator regarding Appellant's second statement in which he admitted to being present at the scene of the shooting because the state introduced Appellant's first statement in which he denied being present at the scene and Appellant's co-defendant testified at trial that Appellant was present at the scene but not involved in the shooting which was consistent with Appellant's second statement.

Relevant Facts

A pre-trial Jackson v. Denno[4] hearing was held to determine the admissibility of Appellant's statements to law enforcement. Randall Stewart took two statements from Appellant during his investigation. R. 5, l. 19 – 6, l. 2; R. 16, l. 7 – 19, l. 14; R. 298, 299; R. 300; State's Ex. 6 (body camera footage of Appellant's second statement on file with this Court). The first statement was prior to Appellant's arrest and the second was after. R. 6, ll. 3 – 22; R. 15, ll. 16 – 25.

In Appellant's first statement to Stewart, he stated that he had been with Smith earlier in the day but was not with Smith at the time of the shooting. R. 299. In Appellant's second statement, he told Stewart that he was present with Smith at the time of the shooting but did not know that Smith was going to shoot at the Brinson's house. See State's Ex. 6. The judge ruled that both statements were admissible.[5] R. 22, l. 10 – 23, l. 15.

Appellant's co-defendant, Ronnie Smith, also gave a video recorded statement in which he admitted he was the shooter and implicated Appellant as a knowing and willing participant.

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4 Jackson v. Denno, 378 U.S. 368 (1964).

5 Defense counsel objected to the admissibility of the first statement but not the second statement. R. 19, l. 21 – 20, l. 2.

See State's Ex. 85 (video recording of Smith's statement on file with this Court). However, Smith's testimony at trial on cross-examination was that although Appellant was the driver at the time of the shooting, Appellant did not know that Smith was going to shoot at the house. R. 130, l. 17 – 137, l. 5.

The state only introduced Appellant's first statement in its case in chief which was introduced and published to the jury during Stewart's direct examination. R. 210, l. 5 – 211, l. 11. Before defense counsel cross-examined Stewart, the state moved to prevent counsel from questioning Stewart regarding Appellant's second statement. The assistant solicitor argued that it was self-serving hearsay and therefore inadmissible. The solicitor further argued that the second statement was not admissible pursuant to Rule 106, SCRE because the second statement was given six months after the first statement. The assistant solicitor cited to State v. Tennant, 383 SC 245, 678 S.E.2d 812 (Ct. App. 2009) and State v. Oglesby, 384 SC 289, 681 S.E.2d 620 (Ct. App. 2009) for support. R. 216, l. 11 – 219, l. 16.

Defense counsel responded that he did not intend to introduce Appellant's full statement but did intend to ask Stewart whether Appellant "later admit[ed] to being on the scene." R. 219, ll. 19 – 24. Counsel argued that was not a self-serving statement because it was an admission by Appellant that he was present at the scene. R. 219, l. 24 – 220, l. 18. The judge agreed with the state and did not allow defense counsel to cross-examine Stewart regarding Appellant's admission that he was with Smith at the time of the shooting. Specifically, the judge stated: "I'm going to adopt the State's position on this." R. 222, ll. 1 – 5.

Discussion

Rule 106, SCRE provides:

> When a writing, or recorded statement, or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

In State v. Terry, 339 S.C. 352, 355-356, 529 S.E.2d 274, 276 (2000), the Supreme Court held that a defendant who elected not to testify at his trial could not introduce his statements to law enforcement pursuant to Rule 804 (b)(3), SCRE. Specifically, Terry had argued that he should be allowed to introduce his confession as a statement against interest because he was "unavailable" by virtue of his exercising of his fifth amendment right to remain silent. Id. The Court disagreed and determined that "Terry could not use his fifth amendment privilege against self-incrimination as both a sword and a shield." Id. at 356, 529 S.E.2d at 277.

The Supreme Court again dealt with the issue of whether a non-testifying defendant may introduce his statement to law enforcement in State v. Cabrera-Pena, 361 S.C. 372, 605 S.E.2d 522 (2004). In Cabrera-Pena, the Court found that the trial judge erred in not allowing the defendant, who was proceeding pro se, to cross-examine the officer on his written statement. The Supreme Court noted that its previous holding in Terry, 339 S.C. 352, 529 S.E.2d 274 (2000) had been misconstrued to the extent it was being read for the proposition that a non-testifying defendant's exculpatory statement can never be admitted under any circumstances. Cabrea-Pena, 361 S.C. at 377, 605 S.E.2d at 524.

The Cabrea-Pena Court pointed out that Terry dealt specifically with whether a defendant was "unavailable" for hearsay purposes when he invoked his fifth amendment right against self-incrimination and its holding was limited to such a situation. Id. In relying on Rule 106, SCRE and State v. Jackson, 265 S.C. 278, 217 S.E.2d 794 (1975), the Cabrea-Pena Court reached the conclusion that the defendant's statement was admissible: "Under Jackson, once the state elected

to utilize Officer Membreno's testimony to elicit incriminating statements made by Cabrera–Pena, justice required that his remaining statements tending to explain or qualify those statements should have been considered in connection therewith. Accordingly, we find Cabrera–Pena's cross-examination of Membreno was improperly limited." Cabrera-Pena, 361 S.C. at 378, 605 S.E.2d at 525 (2004). In State v. Jackson, 265 S.C. 278, 217 S.E.2d 794 (1975), the Court stated:

> When part of a conversation is put into evidence, an adverse party is entitled to prove the remainder of the conversation, so long as it is relevant, particularly when it explains or gives new meaning to the part initially recited. All statements made in a conversation, in relation to the same subject or matter, are to be supposed to have been intended to explain or qualify each other, and therefore the plainest principles of justice requires that if one of the statements is to be used against the party, all of the other statements tending to explain it or to qualify this use should be shown and considered in connection with it.

Jackson, 265 S.C. at 284, 217 S.E.2d at 797 (internal quotations omitted).

Here, the trial judge erred in refusing to allow defense counsel to cross-examine the lead investigator regarding Appellant's admission that he was present with Smith at the time of the shooting. This statement fell within Rule 106, SCRE as being another recorded statement that ought to have been considered in fairness along with the statement which the state had already introduced. Further, the state elicited testimony from Smith that Appellant was with him at the time of the shooting but was not aiding and abetting. R. 137, l. 12 – 139, l. 5.

The state introduced Appellant's first statement which was a denial of any involvement or presence at the scene but then attempted to hide from the jury the fact that Appellant subsequently admitted that he was in fact present on the scene. The trial judge's ruling preventing defense counsel from being able to explain and qualify the statement which had already been used by the state was error. Jackson, 265 S.C. at 284, 217 S.E.2d at 797.

Even though Appellant's second statement was given six months after his first statement, they both dealt with the exact same subject matter and were closely related. It was disingenuous for the state to give the jury the impression that Appellant *only* denied being present at the scene when in reality he later admitted to being present at the scene. As in Cabrea-Pena, it was the state that chose to introduce Appellant's first statement denying involvement. Once the state introduced Appellant's first statement, it would have been only fair that Appellant be permitted to qualify and explain that statement by showing to the jury the fact that he later did admit to being present at the scene. This is especially true because Appellant's second statement was also consistent with Smith's testimony at trial. R. 130, l. 17 – 137, l. 5. The trial judge erred in ruling otherwise and Appellant's conviction should be reversed. See State v. Cabrera-Pena, 361 S.C. 372, 605 S.E.2d 522 (2004); State v. Jackson, 265 S.C. 278, 217 S.E.2d 794 (1975); Rule 106, SCRE.

CONCLUSION

By reason of the foregoing argument, Appellant's convictions should be reversed, and this case remanded to the Sumter County Court of General Sessions for a new trial.

Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR APPELLANT

This 28th day of September, 2020.

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Final Brief of Appellant complies to the best of my ability with Rule 211 (b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Respectfully Submitted,

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This 28th day of September, 2020.