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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions

The Honorable Steven H. John, Circuit Court Judge

Appellate Case No. 2021-001241

The State, Respondent,

v.

Devin Lavar Outen, Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On July 7, 2018, Appellant Devin Lamar Outen was arrested and charged with attempted burglary first degree (attempt, common law, punish as to principal offense (burglary 1st)), entering or attempt to enter house or vessel without breaking with intent to steal and possession, making implements capable of being used in crime. The grand jury for Horry County issued an indictment against Appellant on November 14, 2018 for attempted burglary in the first degree. (Indictment 2018-GS-26-06393). The reaming two charges were not indicted, and Appellant was only tried on the attempted burglary in the first degree.

A trial was held at the Horry County Courthouse in Conway, South Carolina from February 5, 2020 through February 6, 2020, with the Honorable Steven H. John presiding. Prior to the beginning of the trial, Judge John held a hearing to determine the voluntariness of Appellant's statements under Jackson v. Denno, 378 U.S. 368 (1964). (ROA pp. 0062; Trans. Day 1 pg. 56-58). Judge John rules that the State had proved by a preponderance of the evidence that Appellant's statements were freely, voluntarily and intelligently given. Id.

On February 6, 2020, the jury convicted Appellant of attempted burglary in the first degree in violation of S.C. Code Ann.§ 16-01-0080. (ROA pp. 0226; Trans. Day 2 pg. 224, line 8-12). Appellant's sentence was sealed. (ROA pp. 0002; Sentencing Sheet). On October 14, 2021, Appellant appeared before Judge John and his sentence was unsealed and read. Judge John sentenced Appellant to 20 years in prison for the attempted burglary in the first degree conviction. (ROA pp. 0002; Sentence Sheet, ROA pp. 0238; Sentencing Trans. pg. 2 lines 18-20).

Appellant timely filed a notice of appeal on October 20, 2021.

ARGUMENTS

I. BECAUSE RESPONDENT FAILED TO PROVE EEVERY ELEMENT OF THE CRIME ALLEGED DIRECTED VERDICT SHOULD HAVE BEEN GRANTED.

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court is bound by the trial judges factual findings unless they are clearly erroneous. Id.; State v. Preslar, 364 S.C. 466, 472, 613 S.E.2d 381, 384 (Ct. App. 2005).

The appellate courts are bound by fact findings in response to motions preliminary to trial when the findings are supported by the evidence and not clearly wrong or controlled by error of law. Reed v. Becka, 333 S.C. 676, 685, 511 S.E.2d 396, 401 (Ct. App. 1999) (citing State v. Amerson, 311 S.C. 316, 320, 428 S.E.2d 871, 873 (1993)).

Discussion

The State is required to prove every element of a charged offense to obtain a conviction. State v. Attardo, 263 S.C. 546, 211 S.E.2d 868 (1975); State v. Barksdale, 311 S.C. 210, 428 S.E.2d 498 (Ct.App.1993). The trial court must grant a motion for directed verdict of acquittal when the State fails to produce any evidence of the crime charged. State v. Parris, 363 S.C. 477, 481, 611 S.E.2d 501, 502 (2005). At that juncture, the court is concerned only with the existence of evidence, not its weight. Id. at 481, 611 S.E.2d at 502-03. "If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case properly submitted to the jury." Id. at 481, 611 S.E.2d at 503. However, where the facts of the case, even if proved, do not constitute the alleged criminal conduct, a directed verdict must be granted. See State v. Lee, 294 S.C. 461, 365 S.E.2d 734 (1988).

The statute for first degree burglary provides, in pertinent part, "A person is guilty of

burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and . . . the entering or remaining occurs in the nighttime." S.C. Code Ann. § 16-11-311(A)(3) (2003). In the present case, the charge is attempted burglary in the first degree. Therefore, the State was required to present evidence that the Defendant attempted to commit a burglary.

Because the State failed to prove an essential element of the crime charged, namely the existence of an intent to commit a crime within, Appellant's conviction should be reversed, and the case remanded for an entry of a judgment of acquittal. The record is completely void of any evidence Appellant had the intent to commit a crime within the dwelling. Ms. Grice testified that she got there and saw metal coming through her door. (ROA pp. 0086; Trans. Day 1 pg. 80, line 19). This testimony provides neither direct nor circumstantial evidence that Appellant had any intent to commit a crime within the dwelling. Further, Ms. Grice testified that a man was coming towards her with his hands out. (ROA pp. 0093; Trans. Day 1 pg. 87, lines 5-6). A man coming towards Ms. Grice in the front yard is not evidence, direct or circumstantial, that Appellant had any intent to commit a crime within Ms. Grice's dwelling. The record reflects an allegation that furniture was moved. (ROA pp. 0193; Trans. Day 2 pg. 191, lines 9-10). This also fails to produce any evidence of an intent to commit a crime within the dwelling. There is no direct or circumstantial evidence on the record to show Appellant ever entered the dwelling. Ms. Grice was only able to testify she believed he was coming into the house but could not say with certainty whether he entered the house. (ROA pp. 0116; Trans. Day 1 pg. 110, lines 21-22). The State fail to prove beyond a reasonable doubt, or even submit evidence the Appellant intended to commit a crime within and therefore the matter should not have been presented to the jury.

The Respondent alleges that plentiful evidence was produced. However, none of the

evidence the Respondent points to is evidence of a specific intent held by the Appellant. Respondent's arguments rely upon evidence the State presented as to whether or not Appellant was the suspect which attempted to break into Ms. Grice's home. Respondent looks to evidence that Ms. Grice shot the intruder, and that Appellant was located with a gunshot wound. This is not evidence, circumstantial nor direct, that Appellant had a specific intent to commit a crime within Ms. Grice's home. Further, Respondent argues the police located the vehicle belonging to Appellant's girlfriend at the scene and officers had seen Appellant driving a similar car previously. Nothing about this testimony provides proof of an intent on behalf of the Appellant to commit a crime within the home. The location of a tool, i.e., a tire iron in the front passenger seat of the vehicle does not provide an of an intent to commit a crime. A tool is not indicative of a perpetrators *mens rea*. Any argument alleging the use of the tool to break into Ms. Grice's home provides some sort of intent falls flat and would be a false suggestion that an inference can be made of intent here. There is nothing that can be inferred regarding intent as it relates to the tire iron. Hypothetically, a credit card can be used to break into a house, but that does not provide any inference of an intent to commit any crime while within. Ms. Grice identifying the Appellant at his bond hearing further provides no evidence of a specific intent to commit a crime while within Ms. Grice's home, an essential element of the crime Appellant was convicted of.

If that state had presented evidence at trial that the Appellant yelled out "I know you have a safe in your house" or "I know you have coins in your house" evidence would have been presented to submit the matter of intent to the jury. No such evidence is on the record. If the Appellant had confessed, he was looking for something to sell, this would be evidence of a specific intent to commit a crime within.

The Respondent alleges that because the break-in took place at 3:45 a.m., Ms. Grice

testified she "knew somebody was breaking in [her home]" and the person was "in a frenzy trying to get that door open" these facts support an inference the Appellant had an intent to commit a crime within. At most, all this proves is the Appellant may have committed breaking and entering. As Respondent admits in their own Brief, and element of first-degree burglary is the act occurring at nighttime. No testimony was presented of any threats from the Appellant. Even if she had lied and said she had threatened her, that could be something used to infer intent. However, that allegation was not made. She never testified he told her he wanted her money. She never sees Appellant inside her house going through her drawers.

If testimony had been presented that she had seen the Appellant in her closet going through her stuff, this would be circumstantial evidence he is trying to steal and show an intent. Again, if Ms. Grice had testified, Appellant yelled out to her he wanted all her money, this would be direct evidence of an intent. Ms. Grice never saw Appellant do anything other than try to break into her house.

Respondent is trying to make this a general intent crime. It is not. The Appellant was convicted of attempted first degree burglary, a specific intent crime. Therefore, every element of the crime must be proved. There has to be evidence of every element. There has to be evidence for the jury to infer there was a specific intent to commit a crime within and this case is completely void of any such evidence. The Respondent is trying to get around the Appellant's lack of intent. The specific intent must be proven on its own. Specific intent cannot be inferred by someone else's belief of what the Appellant may do.

II. BECAUSE APPELLANT'S COUNSEL MADE EGREGIOUS STATEMENTS AGAINST APPELLANT'S INTEREST THOSE STATEMENTS SHOULD NOT HAVE BEEN CONSIDERED BY THE JURY

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court is bound by the trial judge's factual findings unless they are clearly erroneous. Id.; State v. Preslar, 364 S.C. 466, 472, 613 S.E.2d 381, 384 (Ct. App. 2005).

Discussion

As a general rule, inflammatory remarks which are calculated to appeal to the passions or prejudices of a jury should be affirmatively condemned. South Carolina State Highway Dep't. v. Nasim, 255 S.C. 406, 411, 179 S.E.2d 211, 213 (1971). "[W]hether or not the particular arguments are so prejudicial as to constitute reversible error depends upon the nature of the utterances and the circumstances under which they were made." Id. Under certain circumstances, this Court will grant a new trial despite the aggrieved party's failure to contemporaneously object to the argument if the prejudice caused by the argument is clear. Dial v. Niggel Assoc., Inc., 333 S.C. 253, 256, 509 S.E.2d 269, 271 (1998); Toyota of Florence, Inc., v. Lynch, 314 S.C. 257, 263, 442 S.E.2d 611, 615 (1994).

The court looks to whether the comment "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). The state's second witness called at trial was Phyllis Grice, the alleged victim in the case. While on the stand, the Appellant's counsel stated to the alleged victim "I'd like to begin by recognizing your bravery in this situation." (ROA pp. 0101; Trans. Day 1 Pg. 95). Therefore, during the third time the jury heard from defense counsel and the second

set of questioning; defense presented to the jury an insinuation of wrongdoing on behalf of Appellant. This statement should be viewed with the great weight of the bias and prejudice it would infect upon the jury. The appellant's own counsel made statements of sympathy towards the alleged victim and against Appellant's interest. This is an adversarial system of justice, and this proceeding was fully lacking adversarial fervor by the Appellant's counsel. Appellant's counsel was vested with a duty to protect Appellant from statement such as this which would infer the defendant's guilt, not through evidence but through passions and prejudices exposed to the jury members. There was other person present to object to these bias statements, as that protection of Appellant was vested in Appellant's trial counsel.

III. BECAUSE APPELLANT HAD BEEN INJURED, HOSPITALIZED AND WAS UNDER THE INFLUENCE OF INTOXICANTS APPELLANT'S STATEMENT WAS NOT FREELY, VOLUNTARILY AND INTELLIGENTLY GIVEN AND SHOULD HAVE BEEN SUPRESSED.

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court is bound by the trial judges factual findings unless they are clearly erroneous. Id.; State v. Preslar, 364 S.C. 466, 472, 613 S.E.2d 381, 384 (Ct. App. 2005).

The trial judge determines the admissibility of a statement upon proof of its voluntariness by a preponderance of the evidence. State v. Washington, 296 S.C. 54, 55, 370 S.E.2d 611, 612 (1988); State v. Smith, 268 S.C. 349, 354, 234 S.E.2d 19, 21 (1977). On appeal, the conclusion of the trial judge as to the voluntariness of a statement will not be reversed unless so erroneous as to show an abuse of discretion. State v. Von Dohlen, 322 S.C. 234, 242, 471 S.E.2d 689, 695 (1996). When reviewing a trial judge's ruling concerning voluntariness, the appellate court does

not re-evaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial judge's ruling is supported by any evidence. State v. Saltz, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001).

Discussion

"(T)he burden is on the State to prove by a preponderance of the evidence that his rights were voluntarily waived." State v. Neeley, 271 S.C. 33, 40, 244 S.E. (2d) 522, 526 (1978) (Emphasis supplied). "(T)he prosecution must prove ... by a preponderance of the evidence that the confession was voluntary." Lego v. Twomey, 404 U.S. 477, 489, 92 S. Ct. 619, 627, 30 L.Ed. (2d) 618, 627 (1972) (Emphasis supplied).

A statement obtained during a custodial interrogation is inadmissible unless the suspect was advised of and voluntarily waived his rights. Miranda v. Arizona, 384 U.S. 436, 498-500 (1966); State v. Saltz, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001). If a suspect was advised of his Miranda rights but made a statement, the burden is on the State to prove by a preponderance of the evidence that his rights were voluntarily waived. Saltz, 346 at 135, 551 S.E.2d at 252; State v. Rochester, 301 S.C. 196, 200, 391 S.E.2d 244, 247 (1990); State v. Washington, 296 S.C. 54, 55, 370 S.E.2d 611, 612 (1988). A statement is not admissible unless it was voluntarily made. State v. Von Dohlen, 322 S.C. 234, 243, 471 S.E.2d 689, 694 (1996); State v. Compton, 366 S.C. 671, 680, 623 S.E.2d 661, 666 (Ct. App. 2005); see also State v. Childs, 299 S.C. 471, 475, 385 S.E.2d 839, 842 (1989) (The test of admissibility of a statement is voluntariness.). This voluntariness requirement is in addition to the intelligent waiver mandate of Miranda. See State v. Middleton, 288 S.C. 21, 25, 339 S.E.2d 692, 694 (1986) (In order to secure the admission of a defendants statement, the State must affirmatively show the statement was voluntary and taken in compliance with Miranda.) (citations omitted). It is now axiomatic . . . that a defendant in a criminal case is

deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary [statement], without regard for the truth or falsity of the [statement] . . . even though there is ample evidence aside from the [statement] to support the conviction. Jackson v. Denno, 378 U.S. 368, 376 (1964).

After the pull of the jury, the Court held a hearing pursuant to Jackson v. Denno. Under Jackson v. Denno, a defendant is entitled to a reliable determination as to the voluntariness of his [statement] by a tribunal other than the jury charged with deciding his guilt or innocence. State v. Fortner, 266 S.C. 223, 226, 222 S.E.2d 508, 510 (1976).

During the custodial interrogation, not only was Appellant injured, in substantial pain and continuing to bleed, but he was also under the influence of intoxicants which could be reasonably expected to alter Appellant's state of mind. When Appellant was first picked up, Appellant was suffering from a gunshot wound. (ROA pp. 0041; Trans. Day 1 pg. 35, lines 17-18). The Appellant was then taken to the hospital and following the hospital was taken to the M.L. Brown Building to give a statement. (ROA pp. 0041; Trans. Day 1 pg. 35, lines 18-19). While at the hospital, Appellant was given Oxycodone as a result of the gunshot wound. (ROA pp. 0041; Trans. Day 1 pg. 35, lines 20-21). Further, Horry County officers were aware the Appellant had been drinking. (ROA pp. 0041; Trans. Day 1 pg. 35, line 22). After the Appellant's statement was taken, he was returned to the hospital due to his gunshot wound. (ROA pp. 0042; Trans. Day 1 pg. 36, lines 1-2). The record is clear, Appellant was injured, required treatment subsequent to the statement and under intoxicants. Further, testimony by the Detective Brantley who conducted the custodial interview of the Appellant indicated the Appellant suffered a through-and-through, single gunshot wound to the abdomen. (ROA pp. 0046; Trans. Day 1 pg. 40, line 23-24). Detective Brantley testified the Appellant was shot in the stomach, had brief treatment at the hospital and then was

taken to the M.L. Brown Building for a custodial interrogation. Appellant was interrogated within five hours of suffering a gunshot wound to his abdomen while under the influence of alcohol and pain medication. Through Detective Brantley's own testimony, the Appellant had disclosed he had been drinking that night. (ROA pp. 0052; Trans. Day 1 pg. 46, lines 7-9).

During a Jackson v. Denno hearing, the trial judge must examine the totality of the circumstances surrounding the statement and determine whether the State has carried its burden of showing the statement was made voluntarily. State v. Childs, 299 S.C. 471, 475, 385 S.E.2d 839, 842 (1989); State v. Doby, 273 S.C. 704, 708, 258 S.E.2d 896, 899 (1979) (citing Schneckloth v. Bustamonte, 412 U.S. 218 (1973)). The due process test takes into consideration the totality of all the surrounding circumstances both the characteristics of the accused and the details of the interrogation. Dickerson v. United States, 530 U.S. 428, 434 (2000) (citations omitted); State v. Aleksey, 343 S.C. 20, 30, 538 S.E.2d 248, 253 (2000); State v. Linnen, 278 S.C. 175, 179, 293 S.E.2d 851, 853 (1982); State v. Gillian, 360 S.C. 433, 558, 602 S.E.2d 62, 76 (Ct. App. 2004); see also State v. Myers, 359 S.C. 40, 47, 596 S.E.2d 488, 492 (2004) (A determination whether a statement was given voluntarily requires an examination of the totality of the circumstances.) (citation omitted); State v. Compton, 366 S.C. 671, 680, 623 S.E.2d 661, 666 (Ct. App. 2005) (The test for determining the admissibility of a statement is whether it was knowingly, intelligently, and voluntarily given under the totality of the circumstances.) (internal quotation marks and citation omitted).

In making a determination as to whether a statement was voluntarily and intelligently given, the Court looks to the totality of the circumstances, including the background, experience and conduct of the accused. State v. Ledford, 351 S.C. 83, 87, 567 S.E.2d 904, 906 (Ct. App. 2002) (quoting State v. Franklin, 299 S.C. 133, 138, 382 S.E.2d 911, 914 (1989)); accord State v. Childs,

299 S.C. 471, 475, 385 S.E.2d 839, 842 (1989); State v. Corns, 310 S.C. 546, 552, 426 S.E.2d 324, 327 (Ct. App. 1992). Some of those factors were set forth in Withrow v. Williams, 507 U.S. 680 (1993), which may be considered in the totality-of-the-circumstances analysis and include police coercion, Colorado v. Connelly, 479 U.S. 157, 167(1986); the length of the interrogation, Ashcraft v. Tennessee, 322 U.S. 143, 153-154(1944); its location, see Reck v. Pate, 367 U.S. 433, 441 (1961); its continuity, Leyra v. Denno, 347 U.S. 556, 561 (1954); the defendants maturity, Haley v. Ohio, 332 U.S. 596, 599-601 (1948) (opinion of Douglas, J.); education, Clewis v. Texas, 386 U.S. 707, 712 (1967); physical condition, Greenwald v. Wisconsin, 390 U.S. 519, 520-521 (1968) (per curiam); and mental health, Fikes v. Alabama, 352 U.S. 191, 196 (1957).

South Carolina appellate entities have recognized the appropriate factors to consider in the totality of circumstances include background, experience, and conduct of the accused; age; length of custody; police misrepresentations; isolation of a minor from his or her parent; threats of violence; and promises of leniency. See Childs, 299 S.C. at 475, 385 S.E.2d at 842 (background, experience, and conduct of the accused); In re Williams, 265 S.C. 295, 217 S.E.2d 719 (1975) (age); State v. Jennings, 280 S.C. 62, 309 S.E.2d 759 (1983) (length of custody); State v. Rabon, 275 S.C. 459, 461, 272 S.E.2d 634, 635 (1980) (police misrepresentations); State v. Smith, 268 S.C. 349, 355, 234 S.E.2d 19, 21 (1977) (isolation of minor); State v. Rochester, 301 S.C. 196, 200, 391 S.E.2d 244, 246 (1990) (threats of violence and promises of leniency).

Detective Brantley further testified he was aware the Appellant had a 10th grade education level. (ROA pp. 0054; Trans. Day 1 pg. 48, lines 24-25). Appellant's ability to understand simple instructions along with the potential influence of intoxicants is further indicated through Detective Brantley's affirmation that Appellant printed his name on the signature line of the form and signed his name on the print line. (ROA pp. 0055; Trans. Day 1 pg. 49, lines 20-23). No effort was made

to ensure Appellant understood his rights. (ROA pp. 0055; Trans. Day 1 pg. 49, lines 17-19).

Even more paramount to the involuntariness of Appellant's statements is the fact that Appellant required further medical attention immediately following his custodial interrogation due to his wound bleeding. (ROA pp. 0055; Trans. Day 1 pg. 49, line 25 – pg. 50 lines 1-3). The Appellant needed treatment to the extent that EMS at the M.L. Brown building had to initially assess Appellant according to Detective Brantley's testimony "that was the – the closest medical personal that we had at the time." (T ROA pp. 0056; rans. Day 1 pg. 50, lines 4-7). Following his custodial interrogation, Appellant was then returned to Grand Strand Hospital by ambulance.

The record clearly lays out the Appellant did not have the education or maturity to intelligently waive his rights. Moreso, Appellant was not in a physical or mental condition to allow for any voluntarily or intelligently made statement or waivers of rights. The court's determination that because Appellant never stopped the interview or requested an attorney supports the position that Appellant was unable to voluntarily and intelligently make decisions. A man with a 10th grade education level, under the influence of intoxicants, alcohol and pain medication, as well as bleeding from a gunshot wound would be unable to understand those rights as provided to him and make intelligent decisions during a custodial interrogation.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court and remand for a ruling of acquittal.

Respectfully submitted,
September 2, 2022

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CERTIFICATE OF COMPLIANCE

I certify that Appellant's Final Brief as filed with this Court on September 2, 2022 complies with Rule 211(b), SCACR.

September 2, 2022,

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