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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
The Honorable R. Kirk Griffin, Circuit Court Judge

Appellate Case No. 2022-000449

THE STATE,

Respondent,

v.

MAURICE JEROME PRIOLEAU,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial judge properly granted the State's motion prohibiting Appellant from telling the jury in opening statements or eliciting the fact in cross-examination that he gave a statement to police after turning himself in to authorities where eliciting such information would be self-serving hearsay.

STATEMENT OF THE CASE

During its April 2019 term, a Charleston County grand jury indicted Appellant Maurice Jerome Prioleau for two counts of first degree criminal sexual conduct (CSC 1st), one count of kidnapping, one count of armed robbery, one count of possession of a deadly weapon during the commission of a violent crime, and one count of grand larceny ($2,000 to $10,000). Appellant proceeded to trial before the Honorable R. Kirk Griffin and a jury from March 28th to April 4th, 2022. Appellant was represented by Rodney Davis, Esq. and Carmen Martinez, Esq.

After the close of the State's case, the charge of grand larceny was dismissed. The jury found Appellant guilty as indicted for both counts of CSC 1st and the one count of kidnapping but acquitted him of armed robbery and possession of a deadly weapon during the commission of a violent crime. The trial court sentenced Appellant to an aggregate term of sixty years imprisonment as follows: thirty years imprisonment for the first CSC 1st; thirty years for the second CSC 1st to run consecutive to the first sentence; and thirty years for the kidnapping to run consecutively to the first CSC 1st sentence, concurrently with the second CSC 1st sentence.

This appeal follows.

STATEMENT OF FACTS

In the early evening of August 13, 2018, Kathleen McCarthy ("Victim") was driving to a Piggy Wiggly in North Charleston to get supplies for a cookout with her friends but ultimately decided to get some takeout for her and her neighbor. (Tr. 309, ln. 12—Tr. 314, ln. 11). After she picked up the food, while driving down Rivers Avenue, Victim noticed wood scraps sticking out of a dumpster next to a store across the street from a Circle K gas station.[1] (Tr. 316, ln. 12—Tr. 317, ln. 17). Victim parked by the dumpster and got out to retrieve some of the wood scraps. (Tr. 318, ln. 7—Tr. 320, ln. 19). After placing some of the scraps in the back seat of her car, Appellant approached Victim, who asked her if she "wanted to smoke." (Tr. 320, ln. 20—Tr. 322, ln. 16). Victim responded by stating she did not "smoke pot," to which Appellant reportedly replied, "I don't have pot, I have crack." (Tr. 322, ll. 18-24). Victim, feeling uncomfortable, tried to make small talk to distract Appellant while attempting to get back in her car. (Tr. 323, ln. 14—Tr. 324, ln. 4).

However, as Victim was walking away, she was grabbed from behind on her waist and could feel "a knife" pressing against her. (Tr. 324, ll. 5-19). Appellant then forced Victim into the driver's seat of her car at knifepoint while Appellant got into the front passenger seat. (Tr. 324, ln. 20—Tr. 327). While in the car, Appellant forced Victim to perform fellatio on him several times. (Tr. 328, ln. 18—Tr. 330, ln. 8). In an effort to stall, Victim actuated the trunk lever of her car multiple times, causing the interior dome light to come on and Appellant to get out of the car and close the trunk before getting back into the passenger seat. (Tr. 328—Tr. 331). After being forced to perform fellatio for the fourth time, Victim requested Appellant to retrieve

[1] Victim wanted to use them to stabilize furniture in her bedroom due to root damage from a nearby tree causing the floor to be uneven. (Tr. 306, ln. 17—Tr. 308, ln. 6; Tr. 317, ll. 18-22).

some vodka in her trunk. While Appellant was rummaging through the trunk for the non-existent vodka, Victim retrieved her phone and called her friend John Willis.[2] (Tr. 330, ln. 25—Tr. 332, ln. 10). Additionally, Victim retrieved a taser out of her purse but, when Appellant discovered it, Victim panicked and threw the taser out of her window; at which point Appellant also took her phone and broke it.[3] (Tr. 333, ln. 2—Tr. 334, ln. 5; Tr. 337, ln. 17—Tr. 338, ln. 20).

Shortly thereafter, Appellant forced Victim out of the car by her hair at knifepoint and towards the back of the building. Appellant then forced Victim to disrobe, at which point he forced himself onto her. (Tr. 334, ln. 9—Tr. 335, ln. 10; Tr. 362, ln. 14—Tr. 364, ln. 3). After assaulting Victim, Appellant left her naked, took her underwear, and fled with her vehicle. (Tr. 335—Tr. 336; Tr. 476—Tr. 487). Victim quickly put her dress back on and ran across the street to the Circle K gas station where law enforcement and emergency services responded to shortly thereafter. (Tr. 336, ll. 13-18). While conducting their medical examination, staff at MUSC discovered "numerous abrasions and contusions throughout [Victim's] body"—including but not limited to— on Victim's right upper arm, back, left lower arm, right forearm, hands, left upper chest, abdomen, "numerous" injuries to both legs, and on her buttocks. During the examination by the SANE nurse, Victim was "very anxious, trembling, sobbing at times, tearful, [. . .] overcome with emotion." (Tr. 564—Tr. 566; Tr. 574—Tr. 578). When law enforcement tried to speak with Victim later after being discharged from the hospital, "[s]he didn't even want to leave her house. She was still emotional." (Tr. 599, ll. 11-13).

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[2] Unbeknownst to both Victim and Appellant at the time, Willis began recording the conversation once he realized there was something wrong. (Tr. 298—Tr. 301).

[3] The same taser would be discovered by law enforcement by the building still turned on. (Tr. 466, ln. 1—Tr. 467, ln. 9).

During the pre-trial proceedings, the State moved to prohibit the Defense from bringing in Appellant's statement to police or eliciting the fact that Appellant gave a statement to police, arguing it would be self-serving hearsay:

> [T]he State may choose not to put the Defendant's statement in. I don't know of any other hearsay exception or any other rule that would allow the Defendant to put his own statement in. It's kind of a mixed bag. It's self-serving. He gives an excuse for what happens that we don't feel that there's any basis in the rules of evidence for him to get in. So part and parcel of that is for him to not be able to talk about the fact that he gave a statement. We would just ask Defense counsel not to elude to any statement given to police, anything he said in his statement during their case or during the trial because it may not come in at all.

(Tr. 62, ln. 18—Tr. 63, ln. 10). Defense Counsel replied by arguing that the fact of giving the statement is not hearsay:

> [B]ut the fact he turned himself in and gave a statement, those are acts, not hearsay. Those are physical acts and we think we should absolutely be able to discuss that not only in opening, but throughout the trial. Hearsay – certainly, if an act is a form of speech, giving someone the bird, et cetera, I would understand that, but that he physically turned himself into police and physically gave a statement, period, is not covered by the hearsay rules and we should be able to talk about it in opening and throughout the case unless it meets some other objection.

(Tr. 63, ln. 18—Tr. 64, ln. 4). The Court subsequently ruled that mentioning the statement or the fact that Appellant gave a statement was inadmissible hearsay, stating:

> Well, it would still create – if the jury hears my client turned himself in and gave a statement, all that's going to be in their mind is what's the statement. And if it's not offered as an admission, it's hearsay. The fact that he gave a statement, while not necessarily – the act of giving a statement is not necessarily hearsay, the net effect is that the jury is going to be wondering well, where is this statement.

(Tr. 65, ll. 6-13). The Court then emphasized that if Defense wanted to talk about the statement, they could easily do so if/when Appellant took the stand. (Tr. 65, ll. 19-23).

The following day, while pre-trial issues were still being worked on, the State noted that they still had not decided whether they would introduce Appellant's statement and reemphasized

that Defense Counsel should be prohibited from mentioning the statement since it would be inadmissible hearsay. The Court agreed and restated its ruling as follows:

> It becomes admissible once it's offered as an admission. At this point, any reference to any statement being made would be hearsay. So as far as opening statements go, I think the Defense can say he turned himself in, that's not a statement, but with regard to any mention of making a statement or any of the specific things which were said during this interview process, those are not admissible at this point.

(Tr. 275, ll. 2-9).

Appellant decided to take the stand in his own defense. While on the stand, he gave a completely different account of what happened between him and Victim. Appellant alleges that, instead of a sexual assault, the encounter between them was a consensual sex for drugs arrangement. (Tr. 651, ll. 17-25). According to Appellant, he had just gotten off work and was walking to "Ten Mile Hill" to "get some drugs" when Appellant was stopped by Victim at the Circle K in her car. (Tr. 648—Tr. 650, ln. 14). Victim then asked Appellant where he was going and agreed to give him a ride but needed "to stop somewhere first." (Tr. 650, ln. 15—Tr. 651, ln. 15). They then stopped by the dumpster with the wood in it and Victim proceeded to give fellatio to Appellant. (Tr. 652). Appellant admitted that during the encounter, he was "rough with her" and "yelling at her" supposedly because she was "stopping" and "doing everything to stall." (Tr. 652, ln. 2—Tr. 653, ln. 16; Tr. 666—Tr. 672; Tr. 678—Tr. 680). Appellant admitted to seeing Victim throw something out the window and admitted to taking her phone from her.[4] (Tr. 653, ll. 3-24; Tr. 678—Tr. 679). However, because Appellant was not satisfied, they got out of the car to have sex around the back of the building. Appellant admitted to taking Victim's car after they were done, telling her he would go get "the stuff," but conceded that he had no intention of bringing the car back. (Tr. 654, ln. 4—Tr. 656, ln. 18).

[4] Appellant, however, claimed that he never saw a taser or stun gun. (Tr. 679—Tr. 680).

Regarding his statement to the police, Appellant admitted to lying about details that differed from how he was testifying that day, stating he did so because "they the police." (Tr. 657—Tr. 658).

Appellant also told police regarding Victim, "[w]hen I left her, she was fine" and claimed that the injuries did not come from him. (Tr. 674, ll. 17-19; Tr. 675, ll. 18-20). When asked about the underwear in the car, Appellant stated that he never saw Victim with any underwear on. (Tr. 686, ln. 24—Tr. 687, ln. 3; Tr. 691, ll. 5-25). Appellant also admitted to denying that it was his voice on the recording, stating "[t]hat's the police. I ain't never going to tell them the truth. They got to figure it out. I'm just being real." (Tr. 689, ll. 8-15).

STANDARD OF REVIEW

"In criminal cases an appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." State v. Saltz, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). The scope of opening statements is in the sound discretion of the judge whose decision will stand absent a showing of an abuse of discretion and prejudice to the complaining party. State v. Harris, 275 S.C. 463, 272 S.E.2d 636 (1980). Similarly, "[t]he scope of cross examination is within the discretion of the trial judge, whose decision will not be reversed on appeal absent a showing of prejudice." State v. Pradubsri, 403 S.C. 270, 276, 743 S.E.2d 98, 101 (Ct. App. 2013). "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." State v. Jennings, 394 S.C. 473, 477–78, 716 S.E.2d 91, 93 (2011) (citation omitted). "To warrant reversal, an error must result in prejudice to the appealing party." State v. Black, 400 S.C. 10, 732 S.E.2d 880 (2012) (citing State v. Commander, 396 S.C. 254, 721 S.E.2d 413 (2011)). Further, "[e]rror 'is harmless where a defendant's guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached.'" State v. Collins, 409 S.C. 524, 538, 763 S.E.2d 22, 29-30 (2014) (quoting State v. Bryant, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006)).

ARGUMENT

The trial judge properly granted the State's motion prohibiting Appellant from telling the jury in opening statements or eliciting the fact in cross-examination that he gave a statement to police after turning himself in to authorities where eliciting such information would be self-serving hearsay.

Appellant argues that the trial court erred in prohibiting him from mentioning anything in opening statements or on cross examination about the fact that he gave a statement to police after turning himself in. Appellant contends that, by doing so, the trial court abused its discretion in finding the statement to be inadmissible hearsay. He argues that he was not given "full and fair application of the South Carolina Rules of Evidence" and was prejudiced by not allowing the jury to know that he gave a statement. This argument is without merit because unless Appellant introduced the statement through his own testimony, it is self-serving hearsay.

Hearsay

Hearsay is generally defined as a "statement, other than one made by the defendant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c) SCRE; State v. King, 422 S.C. 47, 66, 810 S.E.2d 18, 28 (2017). "A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." Rule 801(a), SCRE. "Hearsay is not admissible unless there is an applicable exception." King, 422 S.C. at 66, 810 S.E.2d at 28 (quoting State v. Brockmeyer, 406 S.C. 324, 351, 751 S.E.2d 645, 659 (2013)). Even if evidence is improperly classified as hearsay and prohibited from entry into the record, an appellant still bears the burden of demonstrating that they were prejudiced since the trial court has broad discretion when it comes to the scope of evidence. *See* State v. Golson, 349 S.C. 421, 562 S.E.2d 663 (Ct. App. 2002) (finding that error in excluding defendant's statement to witness that shooting was accidental was harmless).

Here, Appellant is seeking to admit an out of court statement, made by himself, for the purpose of giving himself exculpatory evidence without hazarding the risks of cross-examination. As our own jurisdiction and many others have already concluded, this is not an acceptable form of evidence at trial and it was proper for the trial court here to conclude accordingly. As our State Supreme Court surmised in Terry,

> A defendant seeking to testify and make exculpatory statements must face cross-examination. That is a basic rule of our adversary system. To hold otherwise would permit the criminally-accused to set out all the facts which fall in his favor without laying himself open to cross-examination.

State v. Terry, 339 S.C. 352, 357, 529 S.E.2d 274, 277 (2000) (quoting United States v Kimball, 15 F.3d 54 (5th Cir. 1994); Castro v. State, 914 S.W.2d 159, 163 (Tex. Ct. App. 1995)) (internal quotations omitted). Here, although he eventually would make himself available for cross-examination by taking the stand, Appellant attempted to introduce potentially exculpatory evidence while still retaining the right to exercise the 5th Amendment before the State had finished presenting their case-in-chief. As the Court in Terry concluded, a defendant cannot "use his fifth amendment privilege against self-incrimination as both a sword and shield." Terry, 339 S.C. at 356, 529 S.E.2d at 277. Similarly, in United States v. Palow, the First Circuit Court of Appeals determined that the requirement of Rule 801(d)(2)(A), from the Federal Rules of Evidence, that an admission be offered against a party is designed to exclude the introduction of self-serving statements by the party making them. United States v. Palow, 777 F.2d 52, 56 (1st Cir. 1985).

In Terry, the South Carolina Supreme Court affirmed the trial court's suppression of defendant's statement he made to police that he tried to introduce himself as a statement against his penal interest without taking the stand to testify and subjecting himself to cross-examination. Id. at 357, 529 S.E.2d at 277. Defendant was charged for the murder and sexual assault of a

woman. Id. at 354, 529 S.E.2d at 275-76. Defendant gave a statement to police "in which he maintained he had gone to victim's house and had consensual sex with her" and that "he lost his temper" when victim became angry with him. Id. at 355, 529 S.E.2d at 276. At trial, defendant elected not to testify and, "[w]hen the state decided not to introduce the statement," defendant "contended he should be permitted to introduce it as a statement against his penal interest." Id. The trial court ruled that the statement was inadmissible. Id. After determining that exercising the 5th amendment privilege to not testify did not make one "unavailable" for the purposes of Rule 804(b), the Court concluded that defendant also should not have been permitted to "elicit the fact that he had given a statement in order to demonstrate that he had cooperated with police." Id. at 357, 529 S.E.2d at 277. Defendant argued that the jury "was left with the erroneous impression [he] stood silent in the face of an accusation that he committed murder" but the Court disagreed. Id. (quotation omitted).

As the trial court in this case surmised, talking about the statement or the fact that a statement was given would be confusing to the jury. (Tr. 65, ll. 6-13). Similarly, the Supreme Court in Terry noted that "[a]dmission of the fact that [defendant] cooperated with police, without giving *the substance* of the statement, would, in our opinion have been *confusing and misleading* to the jury." Id. at 357, 529 S.E.2d at 277 (citing People v. Harvey, 208 Cal.Rptr. 910, 925, 163 Cal.App.3d 90, 115 (1985)) (emphasis added). Plus, the Court noted that any issue with defendant's seeming cooperation or lack thereof was made irrelevant by the fact that an Agent testified about defendant's cooperation and "defense counsel reiterated this fact to the jury in closing," meaning the Court discerned "neither error nor prejudice in exclusion of this evidence." Id. at 357-58, 529 S.E.2d at 277. Again, in this case, Detective Jellico testified that Appellant turned himself in, thus deflating Appellant's argument. (Tr. 614).

In United States v. Wilkerson, 84 F.3d 692 (4th Cir. 1996), the Fourth Circuit Court of Appeals found no error in the district court's prohibition on the defendant from asking an FBI agent under cross-examination about the contents of exculpatory statements made post-arrest regarding possession of bait money taken in a bank robbery, holding that it was inadmissible self-serving hearsay. As the First Circuit found in Palow, the Federal Rules of Evidence do not "provide an exception for self-serving, exculpatory statements made by a party which are being sought for admission by that same party." Wilkerson, 84 F.3d at 696 (citation omitted).

Similarly, in United States v. Fernandez, 839 F.2d 639 (9th Cir. 1988), the Ninth Circuit Court of Appeals held that defendant's attempt to elicit the contents of his alleged post-arrest statement from an FBI agent under cross examination was an attempt to introduce inadmissible hearsay and noted that defendant was attempting to place his statement before the jury without subjecting himself to cross-examination, "precisely what the hearsay rule forbids." Id. at 640 (citing Rule 801(c), Fed.R.Evid.; United States v. Willis, 759 F.2d 1486, 1501 (11th Cir. 1985)); *see also* United States v. Ford, 761 F.3d 641, 651-52 (6th Cir. 2014) (finding district court properly prohibited defendant from eliciting testimony regarding exculpatory out-of-court statements and specifically finding that Fed.R.Evid. 801(d)(2), as a hearsay exception, does not "extend to a party's attempt to introduce his or her own statements through the testimony of other witnesses.") (quotation omitted); United States v. Rivera-Hernandez, 497 F.3d 71, 80-81 (1st Cir. 2007) (finding that defendant's attempt to introduce an exculpatory statement did not fall under a state of mind hearsay exception); Cotton v. State, 763 So. 2d 437 (Fla. Dist. Ct. App. 2000) (same, and also noting that "the mere fact that the defendant made the statement to the police is not relevant to any material fact or issue").

Appellant introducing the fact that he gave a statement through any other means other than testifying himself would be inadmissible as hearsay. Even if not hearsay, the trial judge did not err because Appellant testified in his own defense and talked about his statement with police. Therefore, Appellant was not prejudiced because the jury still heard what Appellant wanted them to hear.

Harmless Error

The Prohibition of Appellant mentioning in opening statements or through cross examination that he gave a statement to police after turning himself in is harmless because Appellant testified at trial that he gave a statement and therefore the jury still had the information in front of them and it did not prejudice Appellant. Generally, "[e]rror is harmless when it could not reasonably have affected the result of the trial." Golson, 349 S.C. at 429, 562 S.E.2d at 667 (internal citations omitted). "In determining whether error is harmless beyond a reasonable doubt, we often look to whether the 'defendant's guilt has been conclusively proven ... such that no other rational conclusion can be reached.'" State v. Ostrowski, 435 S.C. 364, 401, 867 S.E.2d 269, 288 (Ct. App. 2021) (quoting State v. Reyes, 432 S.C. 394, 406, 853 S.E.2d 334, 340 (2020)) (citations omitted). "'[O]verwhelming evidence' of a defendant's guilt is a relevant consideration in the harmless error analysis." Id. (citations omitted).

In the present case, there is plenty of other competent evidence tending to show Appellant's guilt such that a failure to admit this requested evidence would be harmless beyond a reasonable doubt. First and foremost, Appellant testified that he gave a statement. The reason Appellant wanted the information that he gave a statement to police in opening statements or through cross examination was for the jury to hear that information. That information was in front of the jury because Appellant testified to it himself. Second, Appellant's credibility was

shown to the jury when repeatedly admitting to lying to police. (Tr. 657—Tr. 658). Third, Victim's account is corroborated by other forensic, physical, and testimonial evidence demonstrating that she was in fact sexually assaulted by Appellant rather than being apart of a consensual drug for sex arrangement. There is the recorded phone call to Willis demonstrating the hostile interaction between Victim and Appellant. (Tr. 298—Tr. 301). The taser was found in the parking lot later by police still turned on. (Tr. 466, ln. 1—Tr. 467, ln. 9). Then, there is the physical evidence and testimony regarding Victim's injuries and the presence of Appellant's DNA on Victim and her car. (Tr. 538—Tr. 589). Finally, there is the Victim's underwear left in the car that was stolen by Appellant, suggesting that it was taken after the assault as a trophy. (Tr. 335—Tr. 336; Tr. 476—Tr. 487). Therefore, there was plenty of other evidence to demonstrate Appellant's guilt of sexual assault and any error in failing to admit testimony regarding a statement to police during opening statements or through cross examination did not prejudice Appellant and was therefore harmless.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgments and convictions of the lower court should be affirmed.

Respectfully submitted,

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