STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Court of General Sessions

The Honorable Daniel D. Hall, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

Israel Mendoza Cervantes,

APPELLANT.

APPELLATE CASE NO. 2022-001214

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the Trial Court err by denying Cervantes' motion to suppress his custodial statement when the statement was made involuntarily as a result of improper influence by law enforcement?
2. Did the Trial Court err by denying Cervantes' motion for mistrial when the State misstated the law during its closing argument?

STATEMENT OF THE CASE

This is an appeal from Appellant Israel Mendoza Cervantes' convictions for trafficking heroin, 28 grams or more, possession of a weapon during a violent crime, and possession with intent to distribute cocaine. (R. pp. 309-11). Cervantes was arrested on October 24, 2018. (R. p. 51, lines 10-14). On August 22, 2022, the State called this case for trial. (R. p. 1, lines 5-12). Before trial, Cervantes moved to suppress statements made to law enforcement, which the trial court denied. (R. pp. 33-36).

Following a jury trial, Cervantes was convicted of trafficking heroin, 28 grams or more, possession of a weapon during a violent crime, and possession with intent to distribute cocaine. (R. p. 299, lines 9-17). He was sentenced to twenty-five years, five years, and fifteen years respectively, with the twenty-five and fifteen-year sentences to be served concurrently and the five-year sentence to be served consecutively to the twenty-five year sentence. (R. p. 310, lines 9-22). Thereafter, Cervantes timely served and filed a notice of appeal.

STATEMENT OF FACTS

On October 24, 2018, law enforcement arrested Israel Mendoza Cervantes at 220 Leica Lane in West Columbia, South Carolina. (R. p. 51, lines 10-14). The Richland County narcotics unit had been investigating a drug operation; one of the targets was Cervantes and the other was Angel Ibarra, otherwise known as "Ace and Migo." (R. p. 61, lines 10-16). When the targets moved into Lexington County, Richland County narcotics investigator David Colwell contacted the Lexington County narcotics unit. (Id.). Lexington County law enforcement subsequently opened a drug investigation concentrating on both targets. (R. pp. 61-62). They began to conduct surveillance, primarily on 220 Leica Lane in West Columbia, Lexington County, which they determined to be the main location of the drug operation (R. p. 62, lines 17-25). Law enforcement learned that 220 Leica Lane was Ibarra's mom's residence, that Ibarra lived there, and that Cervantes did not live there. (R. p. 63, lines 5-16). However, law enforcement did observe Cervantes going to and from that location, specifically the shed located on the property. (R. p. 63, lines 11-14).

After several weeks of surveillance, the lead investigator, Meghan Dabkowski, obtained a search warrant for 220 Leica Lane, looking for items related to the suspected drug operation. (R. p. 66, lines 8-19). On October 24, 2018, the search warrant was executed on 220 Leica Lane by Lexington County SWAT and narcotics, as well as other members of law enforcement from Lexington and Richland Counties. (R. pp. 67-68). After SWAT secured the property, one fifteen year old juvenile was found in the residence and Cervantes was found in the shed. (R. p. 70, 83); Ibarra had left shortly before the execution of the search warrant. (R. p. 69, lines 22-25). Inside the shed, law enforcement found items near Cervantes, including multiple guns, ammunition, digital scales, a cutting agent, a clear glass with a spatula, packaged balloons, unpackaged

balloons, cash, a television hooked up to outside cameras, and four plastic bags containing a brown rock substance. (R. pp. 74-82, 115). Ultimately over 100 grams of heroin and at least 7.58 grams of cocaine were determined to have been found amongst the items in the shed. (R. pp. 219-220). No items related to the drug operation were found near the juvenile in the residence. (R. p. 71, lines 3-6).

Suppression Hearing

A pre-trial suppression hearing concerning Cervantes' unrecorded statement to law enforcement was held on August 22, 2022. (R. pp. 2-36).

According to testimony presented, Officer Brian Smith met with Cervantes and the juvenile when they were brought to him from their respective locations following the execution of the search warrant (R. pp. 4-5). Smith read Cervantes and the juvenile their Miranda Warnings simultaneously, while they were handcuffed and standing side by side. (R. pp. 9-10). Regarding Cervantes, Smith testified that he did not threaten Cervantes, that Cervantes indicated he understood his rights, and that Cervantes indicated he wished to speak with law enforcement. (R. pp. 6-7). Regarding the juvenile, Smith testified that law enforcement tried to contact his parents once they realized he was a juvenile, and he "believe[s] he was taken out of handcuffs at that point", but he was unable to identify whether this took place before or after Cervantes was interviewed by investigators. (R. p. 10, lines 5-18).

Investigators Colwell and Dabkowski then spoke with Cervantes, interviewing him in the front yard of 220 Leica Lane, away from everything else. (R. p. 19, lines 5-13). Colwell stated that he knew Smith had given Cervantes his Miranda warnings, that Cervantes indicated that wanted to speak with law enforcement, and that Colwell did not threaten Cervantes. Colwell

described Cervantes' statement to law enforcement as "He had claimed possession over the items and the drugs within the shed. He stated that him and his partner that we knew as Ace who had been identified as Angel were drug trafficking, making sales from that location." (R. p. 14, lines 10-13). Like Smith, Colwell was unable to state whether the juvenile had been released before or after Cervantes was interviewed. (R. p. 14, lines 20-22).

Investigator Dabkowski also testified that Smith administered Miranda, Cervantes agreed to speak with law enforcement, and Cervantes was not threatened. She further testified that Cervantes "informed us himself and the co-defendant in the case Angel Ibarra were running a drug operation out of that location at 200 Leica Lane and that the items located inside the shed belonged to the two of them." (R. pp. 18-20). Additionally, she said she had asked Smith to Mirandize both Cervantes and the juvenile together. (R. p. 18, lines 8-12). On cross-examination, however, Dabkowski admitted that the juvenile was found inside the house, not in the shed where Cervantes was found, and that there were no drugs found around the juvenile; the only drugs found in the house were "[a] possession amount in the co-defendant's bedroom." (R. pp. 22-23). In response to questions concerning her request that Smith mirandize the juvenile, Dabkowski stated that it was an automatic thing because he was in handcuffs, and that it didn't mean he was going to jail. (R. p. 23, lines 8-17). Dabkowski was certain that the juvenile had been released from handcuffs when she and Colwell interviewed Cervantes, but was not certain whether he had been released to his mom yet or not; if he was on scene, "[h]e was simply standing – he was left with Agent Smith simply until we had an adult there to release him to." (R. pp. 23-24).

Defense counsel called Cervantes to the stand, who denied being given Miranda, described being pulled onto the neighboring property, where the officers interviewing him,

specifically Colwell, stated that he was "about to do a lot of time. You're gonna do more than 25 to life, all these drugs, all these guns. Your life is over with. You know, we're gonna take [the juvenile.] We're gonna take his mother. Everybody's going to jail. . ." (R. pp. 26-27, 30). In response to this, Cervantes told Colwell "[E]nough. It has nothing to do with him. I told [Colwell] it was all me, that it was all between me and Angel, that we were the only ones that had anything to do with that." (R. p. 27, lines 22-25). Finally, Cervantes agreed that the juvenile was released to his mother, but stated that it was only after he had been interviewed and was headed to jail; during his interview, the juvenile "still stood there handcuffed." (R. p. 28, lines 18-21, 25).

At the close of testimony, Defense counsel moved for suppression of Cervantes' statement to law enforcement on the grounds the Cervantes' confession was not voluntarily given due to the threats made about involving the juvenile and the treatment of the juvenile in front of Cervantes. (R. pp. 33-34). In response, the State argued that the juvenile was simply detained as a result of common practice, that Cervantes was not threatened in any way, and that there was no connection between Cervantes' and the juvenile that would cause Cervantes to want to protect him. (R. pp. 34-35). The Court denied the motion to suppress, finding that Cervantes was administered his rights and voluntarily waived them, and noting that "[i]t appears that the testimony of all officers involved [was] that there was no threats, no promises, no rewards." (R. pp. 35-36).

Solicitor's Closing Argument

The State failed to request a charge on "the hand of one is the hand of all" during the jury charge conference before closing arguments. (R. pp. 222-231). During the solicitor's closing argument, she discussed "the hand of one is the hand of all" anyway, stating, "[s]ince we talked

so much about Ace and Migo, let's talk about the hand of one is the hand of all. The hand of one is the hand of all. If a crime is committed by two or more people acting together in committing a crime, the act of one is the act of all." (R. p. 240, lines 1-5). Defense counsel promptly objected and a brief bench conference ensued. (R. p. 240, lines 6-9). While the solicitor made no further mention of "the hand of one is the hand of all" in her remaining argument, she continued to link "Ace and Migo" throughout, having linked them at least fourteen times prior to her mention of "the hand of one is the hand of all", as well as referencing them working, "hand in hand", and continuing to link them at least an additional seven times by nickname after her discussion of "the hand of one is the hand of all", including referencing them "working hand in hand together" again (R. pp. 233-253).

Following closing arguments, the Court excused the jury and heard arguments on "the issue of charging hand of one hand of all." (R. pp. 274-275). The Court ultimately denied the State's request charge it, ruling it would not charge accomplice liability because Ibarra had not been present when the search warrant was served at the residence, he had not been a witness in this case, and ruling additionally that it was unnecessary due to the fact that the statutes for trafficking and possession with intent to distribute incorporate conspiracy. (R. pp. 276-277). As additional support, the Court also pointed out how evidence of Ibarra's trafficking conviction had not been permitted in this trial based on the fact it was unfairly prejudicial. (R. p. 277, lines 14-25). Defense counsel then renewed their objection regarding the "the hand of one is the hand of all" statements in the solicitor's closing argument and moved for a mistrial based on the solicitor's misstatement of the law applicable to the case. (R. p. 278, lines 2-21). Defense counsel argued the State's closing amounted to improper burden shifting, stating "the Solicitor essentially told the jury even if you don't think you can prove that he did this beyond a

reasonable doubt, you can still find him guilty if you think someone else did it." (R. p. 278, lines 17-20). Defense counsel also stated her belief that a jury instruction would not cure the issue. (R. p. 278, lines 20-21).

The Court overruled Defense' counsel's objection and denied the motion for a mistrial, briefly stating that, prior to closing arguments, the Court had instructed the jury that closing arguments are not evidence in the case. (R. pp. 278-279). The Court then charged the jury, specifically stating during its charge on trafficking heroin that someone can be guilty if he or she "otherwise aids, abets, attempts, or conspires to sell, manufacture, deliver, or purchase [heroin]," (R. p. 289, lines 16-18); the charges on possession of cocaine with intent to distribute and possession of a weapon during a violent crime did not include similar language. (R. pp. 290-293).

STANDARDS OF REVIEW

Statements

"On appeal, the conclusion of the trial [court] on issues of fact as to the voluntariness of a confession will not be disturbed unless so manifestly erroneous as to show an abuse of discretion." State v. Rochester, 301 S.C. 196, 200, 391 S.E.2d 244, 247 (1990). "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. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "When reviewing a trial court's ruling concerning voluntariness, [the appellate court] does not reevaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial courts ruling is supported by any evidence." State v. Saltz, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001).

Mistrial

"The granting or refusing of a motion for a mistrial lies within the sound discretion of the trial court and its ruling will not be disturbed on appeal absent an abuse of discretion amounting to an error of law." State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627-28 (2000).

ARGUMENTS

I. The Trial Court erred by denying Cervantes' motion to suppress his custodial statement to law enforcement when the statement was involuntarily given in response to improper influence from law enforcement, including threats against a juvenile and the juvenile's family.

Under Jackson v. Denno, 378 U.S. 368, 376 (1964), "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 confession, without regard to the truth or falsity of the confession." "Whenever evidence is introduced that was allegedly obtained by conduct violative of a defendant's constitutional rights, the defendant is entitled to have the trial judge conduct an evidentiary hearing outside of the presence of the jury at the threshold point to establish circumstances under which it was gained." State v. Creech, 314 S.C. 76, 84, 441 S.E.2d 635, 639 (Ct. App. 1993).

"When seeking to introduce a confession, the State must prove that the statement was voluntary and taken in compliance with *Miranda*." [1] State v. Goodwin, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009). "The test of voluntariness is whether a defendant's will was overborne by circumstances surrounding the giving of a confession." *Id.* (citing Dickerson v. U.S., 530 U.S. 428, 434 (2000).

"Our courts have recognized that the appropriate factors to consider in the totality of circumstances analysis include: background, experience, conduct of the accused, age, length of custody, police misrepresentations, isolation of a minor from his or her parent, threats of violence,

[1] "A statement obtained as a result of custodial interrogation is inadmissible unless the suspect was advised of and voluntarily waived his [Miranda] rights." State v. Saltz, 346 S.C. at 135, 551 S.E.2d at 252, citing Miranda v. Arizona, 384 U.S. 436 (1966). Trial testimony from law enforcement conflicted with testimony from Cervantes regarding whether he was given his Miranda rights.

and promises of leniency." State v. Dye, 384 S.C. 42, 47, 681 S.E.2d 23, 26 (Ct. App. 2009). "[A] confession may not be extracted by any sort of threats or violence, or obtained by any direct or implied promises, however slight, *or by the exertion of improper influence*." State v. Rochester, 301 S.C. at 200, 391 S.E.2d 244 at 247 (internal quotations omitted, emphasis added).

Cervantes' statement should have been suppressed because it was made after law enforcement detained his co-defendant's juvenile brother and threatened the juvenile and the juvenile's mother with jail. Statements obtained by law enforcement as a result of threats against third parties have been found to be involuntary as a matter of law. See State v. Corn, 310 S.C. 546, 426 S.E.2d 324 (Ct. App. 1992) ("We find that the testimony of the officers conceding they informed [appellant] his wife could be arrested, that she could be 'involved in the marijuana,' and that their children could be taken from them amounted to an exertion of improper influence rendering [appellant's] statement involuntary. Accordingly we find the trial judge erred as a matter of law in allowing [appellant's] oral statements into evidence."); see also State v. McClure, 312 S.C. 369, 371, 440 S.E.2d 404, 405 (Ct. App. 1994 ("We recognize a threat like the one described by appellant [in which police threatened to arrest his family members unless he confessed], if it occurred, could render [appellant's] confession involuntary.").

Interestingly, the juvenile was not found in the same location as Cervantes; rather he was found in the house, far away from the drugs and the guns relating to the drug operation. He was subsequently handcuffed and dragged out to Cervantes. Whether he was removed from his handcuffs prior to Cervantes' interview is unclear – only one officer testified to that effect – leaving the impression that law enforcement made the conscious choice to detain the juvenile in front of Cervantes in an effort to make an impression on Cervantes.

Furthermore, although there is conflicting testimony as to whether there were verbal threats made against the co-defendant's juvenile brother and mother, it is undisputed that the juvenile was physically detained in Cervantes' immediate vicinity prior to Cervantes' interrogation by law enforcement. The South Carolina Supreme Court has found that, despite law enforcements denials of direct coercion, statements were erroneously admitted where that evidence was disputed by other evidence. See State v. Osborne, 301 S.C. 363, 365, 392 S.E.2d 178, 179 (1990), (Appellant and Sheriff agreed that appellant had been warned each time she spoke with law enforcement that she could be charged with "withholding evidence", despite "many officers testif[ying] that [appellant] was repeatedly advised of her rights and that she was not threatened or coerced . . . .") Similarly, in this case, all of the officers agreed that the juvenile had been in handcuffs, next to Cervantes, where he was read his Miranda rights immediately before Cervantes was interviewed. The fact that Dabkowski, the lead investigator, testified that these actions did not mean the juvenile was going to jail is irrelevant – "[c]oercion is determined from the perspective of the suspect". State v. Miller, 375 S.C. 370, 386, 652 S.E.2d 444, 452 (Ct. App. 2007). It is not a far stretch to state that putting someone, particularly a juvenile, in handcuffs indicates he is in trouble with law enforcement and going to jail, which is what Cervantes clearly indicated was his impression just prior to confessing to law enforcement.

The type of third-party threat described above amounts to improper influence. Therefore, this Court should remand this matter to the Circuit Court with instructions that it suppress Cervantes statement given to law enforcement.

II. The Trial Court erred by denying Cervantes' motion for a mistrial when the State based their closing argument on law that the trial court judge found to be inapplicable in this case.

"In order to receive a mistrial, the defendant must show error and resulting prejudice." Harris, 340 S.C. at 63, 530 S.E.2d at 628. "A trial court is allowed broad discretion in dealing with the range and propriety of closing argument to the jury." Goodwin, 384 at 605, 683 S.E.2d at 509. "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id. (quoting State v. Patterson, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997). The appellate court must review the argument in the context of the entire record. Id.

Here, the trial court erred by overruling Defense counsel's objection to the solicitor's discussion of "the hand of one is hand of all."[2] Defense counsel argued that the solicitor's closing argument was improper burden shifting. The law on burden shifting during closing arguments in South Carolina can be quite stringent. In State v. Liberte, 336 S.C. 648, 521 S.E.2d 744 (Ct. App. 1999) the solicitor's closing argument asked the jury to reflect on whether reasonable doubt was being used as a sword to attack the law. The South Carolina Court of Appeals held that the improper closing warranted reversal and remand, despite there being "very strong "evidence against the Defendant and "no tangible evidence supporting [his] defense." Id., 336 S.C. at 656, 521 S.E.2d 744, 745.[3] There, the appellate court found that "[t]he [solicitor's] argument invited the jury to convict the Defendants, even if the evidence did not prove their guilt

[2] Defense counsel objected during the solicitor's argument but the substance of the objection was not put on the record until after closings, when it was put on the record contemporaneously with Cervantes' motion for a mistrial.

[3] In this present case, the solicitor knew prior to closing arguments that the trial court was not going to charge on "the hand of one is the hand of all" and did not object to its omission during the charge conference.

beyond a reasonable doubt, in order to keep the streets safe from the scourge of drugs." Id., 336 S.C. at 653, 521 S.E.2d at 747.

Here, the solicitor's argument to the jury that "the hand of one is the hand of all" invited the jury to convict Cervantes without the State proving that Cervantes had committed the crimes he was accused of beyond a reasonable doubt. Under the solicitor's argument that "[i]f a crime is committed by two or more people acting together in committing a crime, the act of one is the act of all", the jury could find Cervantes guilty on all counts if there was evidence beyond a reasonable doubt that Angel Ibarra committed the crimes, even if there was reasonable doubt that Cervantes himself had committed the crimes.

Furthermore, the solicitor's improper closing argument was not harmless error. Although the jury charge on trafficking in heroin stated that someone can be guilty if he or she "otherwise aids, abets, attempts, or conspires to sell, manufacture, deliver, or purchase [heroin]", this language, and the possibility of conspiracy,[4] were *not* part of the jury charge on possession with intent to distribute cocaine, nor part of the jury charge on possession of a weapon during the commission of a violent crime. See State v. Patterson., 299 S.C. 280, 384 S.E.2d 699 (1989), overruled on other grounds, (holding misstatements of the applicable law during the solicitor's opening and closing were rendered harmless when the trial judge properly charged the jury.) The solicitor's argument shifted the burden from the State having to prove that Cervantes committed *all three* crimes beyond a reasonable doubt, to simply having to prove that Cervantes worked

[4] When denying the State's request to charge "the hand of one is the hand of all", the trial court based part of its ruling on the fact that the charge for trafficking and possession with intent to distribute would incorporate "conspire"; ultimately, the charge for trafficking did and the charge for possession with intent to distribute did not.

with Ibarra beyond a reasonable doubt on one of them in order for the jury to convict Cervantes of all three.

In addition, when looking at the entire record, the solicitor's comments were such that they denied Cervantes due process. Not only is the entirety of the record replete with references of Cervantes and Ibarra together, including the fact that much of the evidence from Ibarra's trial was used in Cervantes' trial, but the solicitor also linked them together throughout her closing by using the phrase "Ace and Migo" or "Migo and Ace" at least twenty-one times in her closing.[5] The solicitor's repeated references to Cervantes and Ibarra together, in conjunction with her improper argument for guilt on a theory of "the hand of one is the hand of all", reemphasizes the misstatement of the law applicable to the case throughout her closing such that it deprived Cervantes of due process. See State v. McDaniel, 320 SC. 33, 462 S.E.2d 882, n. 1 (Ct. App. 1995) (holding that a solicitor's improper use of the term "you" at least forty-five times during closing argument constituted a "lengthy comment urging the jurors to put themselves in the place of the victim," and was reversible error).

Therefore, this Court should reverse the trial court's decision to deny Cervantes' motion for mistrial and remand this matter to the Circuit Court.

[5] Migo was identified as Cervantes' nickname; Ace was identified as Ibarra's nickname.

CONCLUSION

For the reasons stated above, this Court should reverse Cervantes' convictions for trafficking heroin, 28 grams or more, possession of a weapon during a violent crime, and possession with intent to distribute cocaine, and remand this matter for a new trial with instructions that the Trial Court suppress Cervantes' statement given to law enforcement.

Respectfully Submitted:

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CERTIFICATE OF COUNSEL

The undersigned counsel certifies this Final Brief of Appellant complies 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."

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PROOF OF SERVICE

I, Anna W.Yonge, certify that I served the Final Brief of Appellant on the following individuals pursuant to Rule 262, SCACR, and S.C. Sup. Ct. Order 2021-08-25-02:

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December 14, 2023

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