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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Donald B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CHAD LAVICTOR SIMMONS,

APPELLANT

APPELLATE CASE NO. 2022-001729

FINAL BRIEF OF APPELLANT

SARAH E. SHIPE
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

I. Whether the trial court erred admitting state's exhibits 47 and 48, recordings of appellant's interviews with law enforcement because the statements were not given knowingly, intelligently, and voluntarily where law enforcement refused to tell appellant why he had been arrested and was being questioned and where law enforcement repeatedly told appellant they knew he had done something which created an atmosphere where appellant's will was overborn?

II. Whether the trial court erred admitting state's exhibit 46, recording of 911 call, for the jury where the prejudicial value of the complainant hysterically screaming in the recording substantially outweighed any probative value of the evidence pursuant to Rule 403, SCRE?

STATEMENT OF THE CASE

In September 2019 a Charleston County grand jury indicted appellant for burglary, first degree, assault with intent to commit criminal sexual conduct, and assault and battery of a high and aggravated nature (ABHAN). R. 556. On November 28, 2022, appellant proceeded to trial before the Honorable Donald B. Hocker, and a jury. R. 1. Appellant was represented by Mary Ford and Brendan Daniels. The state was represented by assistant solicitors Chad Simpson and Nicholas Uricchio. R. 1.

At the conclusion of the state's case, Judge Hocker granted appellant's motion for directed verdict as to assualt with intent to commit criminal sexual conduct. R. 455, l. 16-456, l. 4. The jury found appellant was not guilty of burglary, first degree. R. 551, ll. 11-13. The jury found appellant guilty of ABHAN. R. 551, ll. 14-16. Judge Hocker sentenced appellant to fourteen years' imprisonment for ABHAN. R. 554, ll. 21-24.

This appeal follows.

ARGUMENT

I. The trial court erred admitting state's exhibits 47 and 48, recordings of appellant's interview with law enforcement, because the statements were not given knowingly, intelligently, and voluntarily where law enforcement refused to tell appellant why he had been arrested and was being questioned and where law enforcement repeatedly told appellant they knew he had done something which created an atmosphere where appellant's will was overborn.

Standard of review

"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); *see also State v. Reed*, 332 S.C. 35, 43, 503 S.E.2d 747, 751 (1998). Put another way, the reviewing court will reverse the trial court's ruling on the voluntariness of the confession when the ruling is "so erroneous as to constitute an abuse of discretion." *State v. Myers*, 359 S.C. 40, 47, 596 S.E.2d 488, 492 (2004). "In criminal cases, appellate courts are bound by fact finding in response to preliminary motions where there has been conflicting testimony or where the findings are supported by the evidence and not clearly wrong or controlled by an error of law." *State v. Asbury*, 328 S.C. 187, 193, 493 S.E.2d 349, 352 (1997).

Introductory facts

Very early in the morning of September 20, 2018, appellant entered the apartment of Kimberly Cantwell and her three roommates. Kimberly Cantwell testified at trial that she woke up and saw a "dark figure" opening the door to her room. R. 91, ll. 14-16. Cantwell said the person "lunged" at her and pulled her from the bed to the ground. R. 91, ll. 21-23. She acknowledged her memory of the event was blurry but said she was hit on the head with a hard

object and strangled resulting in unconsciousness. R. 92, l. 12-23; 93, ll. 1-18; 95, ll. 4-18. The next thing Cantwell remembered was waking up and seeing the person in the hallway with her roommate's boyfriend, Dan Schwarz. R. 95, ll. 15-22.

Dan Schwarz and two of Cantwell's roommates, Kathryn Constantini and Harley Kowalski testified at trial. R. 59-75; 120-138; 288-307. Dan Schwarz testified that on the night of the incident he was staying over with his girlfriend, a roommate of Cantwell's. R. 59, l. 20-61, l. 6. He woke up to screaming and found a man on top of Cantwell and pulled the man out of her room.[1] R. 61, l. 14-62, l. 14. Schwarz testified that the man stated, "wrong house," numerous times. R. 62, ll. 18-20. The two physically struggled and Schwarz said the man was trying to escape. During their tussle they both tumbled down the stairs. R. 62, l. 21-64, l. 2. Schwarz tried to hold on to the man by his shirt and as the man left his shirt ripped off. R. 64, ll. 7-11.

Kathryn Constantini testified that she woke up because there were lights turned on and she heard something. R. 124, ll. 8-14. She heard screaming and hid until the commotion was over. R. 124, ll. 17-24. Constantini testified she heard a man saying "wrong house." R. 137, ll. 5-13. The following day Constantini found and reported items in the house that were out of place to police. R. 127-133. Roommate, Harley Kowalski's testimony was similar to Constantini's regarding the incident and the following day. R. 289-293.

Appellant maintained he had little to no memory of being in the apartment other than a vague memory of sitting on a couch, telling someone "wrong house," and finding himself at the

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[1] Schwarz's testimony at trial differed from his initial statement to police. R. 70. He denied at trial that he first told police after he heard the screaming, he bumped into the man in the hallway. However, Schwarz agreed that because so much time had passed and because it was a traumatic instance that he did not remember every detail. R. 70, ll. 2-20.

bottom of a flight of stairs. R. 29, ll. 5-16; 30, ll. 3-9; 31, ll. 12-18. At trial, defense counsel did not contest the state's claim that appellant was in the apartment and did not dispute Cantwell's version of the incident. However, defense counsel asserted the defense of involuntary intoxication. R. 55-58; 388-392; 426-428; 508, ll. 1-11; 509, ll. 23-25; 511, ll. 3-18.

Relevant facts

Prior to trial a *Jackson v. Denno*,[2] hearing was held to determine the admissibility of state's exhibits 47 and 48,[3] two recorded statements made by appellant to law enforcement in the days following the incident. R. 2-8; 9-43. The state presented testimony from Elizabeth Wolfsen the investigator who conducted both interviews of appellant. R. 2-7; 10-34.

Regarding state's exhibit 47, appellant's first recorded interview, Elizabeth Wolfsen testified that appellant was arrested, by another officer, at around 1:00 am and their interview began at 2:48 am. R. 4, l. 25-5, l. 2; 26, ll. 10-25. Wolfsen asked some background information of appellant and then advised him of his *Miranda*,[4] rights. R. 5, ll. 11-14. Appellant indicated to Wolfsen that he understood and that he was willing to speak to her. R. 11, ll. 5-10. Wolfsen acknowledged that appellant was unsure if he would be able to make it to work the following day. She testified that she made it clear to appellant he was a suspect and would not be going to work the following day. R. 11, ll. 11-23. She admitted appellant asked what he was being charged with but denied that he asked repeatedly. R. 27, l. 19-28, l. 9. Wolfsen testified she did

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2 378 U.S. 368 (1964).

3 State's exhibits 47 and 48, recordings of appellant's statements to law enforcement are on file with this Court.

4 *Miranda v. Arizona*, 384 U.S. 436 (1966).

not explain to appellant why he was being arrested and questioned until the interview concluded. R. 28, ll. 12-19.

Regarding, state's exhibit 48, the second recorded interview, Wolfsen testified appellant requested to speak with her. R. 20, ll. 5-11; 31, ll. 1-10. Wolfsen said the interview lasted around two hours but acknowledged appellant was in the interrogation room for longer. R. 31, l. 25-32, l. 5. She agreed appellant repeatedly told her he did not remember anything but that regardless she continued pressing him for details. R. 31, ll. 12-21. Wolfsen admitted that while interviewing appellant she may have indicated that the jury would expect him to have a story or explanation for the incident. R. 31, ll. 22-24. Eventually, appellant became upset, worried because he could not give Wolfen answers about the evening. Appellant cried and it was soon after when he suddenly remembered seeing a woman in her bedroom. R. 32, 13-20.

Defense counsel argued both state's exhibits 47 and 48, recorded statements, should be suppressed pursuant to S.C. Code Ann. § 17-13-50 and under the totality of the circumstances. Defense counsel asserted appellant was confused as to why he was being interviewed where Wolfsen refused to tell him why he was under arrest until he made a statement. R. 34, ll. 12-23. Additionally, Wolfsen repeatedly told appellant "I know you did it," which created an atmosphere where his will was overborn and appellant felt he had to say something. R. 42, l. 20-43, l. 1. The state argued that there was no constitutional or statutory requirement that a "person be briefed on the charges or the evidence or what all the state knows or the government knows prior to an interrogation." R. 35, ll. 5-10. The solicitor averred that failing to apprise someone of their charges does not impact the voluntariness of their statement. R. 43, ll. 5-11.

The court ruled the statements were admissible, based on *Crawley*.[5] The court found

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5 *State v. Crawley*, 349 S.C. 459, 564 S.E.2d 683 (2002).

appellant's statements were voluntary even though appellant "was not apprised of the nature of the charges till after the first statement was made." R. 43, ll. 12-25.

During Wolfsen's testimony portions of appellant's interviews, state's exhibit 47 and state's exhibit 48, were played for the jury subject to defense counsel's prior objections.[6] R. 401, l. 10-402, l. 1; 421, ll. 12-17.

Discussion

The trial court erred in admitting portions of state's exhibits 47 and 48, recordings of appellant's interviews with law enforcement where his statements could not have been knowingly, intelligently, or voluntarily made because law enforcement not only refused to tell him the reason for his detention and interrogation but also repeatedly told him they knew he had done something to the point where his will was overborn.

A criminal defendant is deprived of due process if his conviction is founded, in whole or in part, upon an involuntary confession. *Jackson v. Denno*, 378 U.S. 368, 377 (1964). This principle is best justified when viewed as part and parcel of "fundamental notions of fairness and justice in the determination of guilt or innocence which lie embedded in the feelings of the American people and are enshrined in the Due Process Clause of the Fourteenth Amendment." *Haley v. Ohio*, 332 U.S. 596, 607 (1948). The test for determining the admissibility of a statement is whether it was knowingly, intelligently, and voluntarily given under the totality of the circumstances. *State v. Rabon*, 275 S.C. 459, 272 S.E.2d 634 (1980).

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[6] The state published the following portions of State's 47, interview with appellant, to the jury: Clip 1, starting 45.50 until the end, Clip 2, beginning until 3.55, Clip 3 starting at 2.45 until 9.46. R. 412, ll. 1-4; 415, ll. 18-24. The state also published the following portions of State's 48, second interview with appellant to the jury. Clip 1, starting at 24 until 27.30 and Clip 2 starting at 50.10 until the end. R. 421, ll. 20-23; 424, ll. 18-20.

In determining whether a confession was given "voluntarily," the Court must consider the totality of the circumstances surrounding the defendant's giving the confession. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973). As the United States Supreme Court has instructed, the totality of the circumstances includes "the youth of the accused, his lack of education or his low intelligence, the lack of any advice to the accused of his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep." *Id*. (internal citations omitted). Furthermore, no one factor is determinative, but each case requires careful scrutiny of all the surrounding circumstances. *Id*.

The trial court cited *State v. Crawley* as being "right on point," and found it would allow the finding of voluntariness for both statements. R. 43, ll. 12-15. In that case this Court held the failure of law enforcement to tell Crawley that murder was the subject of questioning before she waived her *Miranda* rights did not affect the voluntariness of her confessions and the evidence was sufficient to show that Crawley's confessions were knowingly, intelligently, and voluntarily given despite her claim that she was suffering from withdrawal symptoms. *Crawley* at 459, 562 S.E.2d 683.

In that case Crawley was transported from the county jail, where she was being held on an unrelated charge, to be questioned regarding her involvement in the murder of Eugene Davis. *Id*. at 462, 562 S.E.2d 685. During that conversation Crawley confessed to her involvement in the murder of Davis. *Id*. In support this Court cited the following language from United States Supreme Court's decision in *Colorado v. Spring*, 479 U.S. 564 (1977).

> Once *Miranda* warnings are given, it is difficult to see how official silence could cause a suspect to misunderstand the nature of his constitutional right—his right to refuse to answer any question which might incriminate him. Indeed, it seems self-evident that

> one who is told he is free to refuse to answer questions is in a curious posture to later complain that his answers were compelled. We have held that a valid waiver does not require that an individual be informed of all information useful in making his decision or all information that might ... affec[t] his decision to confess. [W]e have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights. ... [T]he additional information could affect only the wisdom of a *Miranda* waiver, not its essentially voluntary and knowing nature. Accordingly, the failure of the law enforcement officials to inform [the defendant] of the subject matter of the interrogation could not affect [the defendant's] decision to waive his Fifth Amendment privilege in a constitutionally significant manner.

Id. at 576–577. (internal citations omitted).

This case is distinct from *Crawley* in important ways. Crawley was already being held on unrelated crimes. Appellant had just been arrested, in the middle of the night, and brought in for interrogation. It was not made clear to appellant why he was there, even after he clearly asked. The interview continued for two hours before appellant was told why he was under arrest and being questioned by law enforcement. Adding to appellant's understandable confusion he was being told continually by Wolfsen that she knew he was in the residence, so he began trying to make up a story to fit what it appeared to him that Wolfsen wanted him to say.

It is clear from the recording Wolfsen never overtly threatened appellant either with physical discomfort or with some unknown punishment to obtain a confession from him. However, it is equally clear when watching the entirety of both recorded interviews that appellant is very confused and is trying desperately to please Wolfsen and to give the information that he believes she wants even though he has no recollection of that evening as he stated over and over throughout the course of both interviews. Wolfsen admitted to the court that she indicated to appellant during the second interview that the jury would expect him to have

an explanation for the incident.

Additionally, *Crawley*, did not consider S.C. Code Ann. § 17-13-50 which states:

> (A) A person arrested by virtue of process or taken into custody by an officer in this State has a right to know from the officer who arrests or claims to detain him the true ground on which the arrest is made. It is unlawful for an officer to: (1) refuse to answer a question relative to the reason for the arrest; (2) answer the question untruly; (3) assign to the person arrested an untrue reason for the arrest; or (4) neglect on request to exhibit to the person arrested or any other person acting in his behalf the precept by virtue of which the arrest is made. (B) An officer who violates the provisions of this section is guilty of a felony and, upon conviction, must be fined in the discretion of the court or imprisoned not more than ten years, or both.

S.C. Code Ann. § 17-13-50 (emphasis added).

Wolfsen readily acknowledged to the trial court that she refused to explain to appellant why he had been arrested and questioned until the end of the first interview. The trial court ruled "the fact the defendant was not apprised of the nature of the charges till after the first statement" did not affect the voluntariness and did not provide the remedy of suppression only what could happen to the officer. R. 43, ll. 15-21. While it is true the remedy the statute provides is potential punishment of the violating officer for this unlawful behavior, the refusal of Wolfsen to tell appellant what he was charged with contributed to the totality of the circumstances. Appellant's confusion in conjunction with Wolfsen's insistence that he had done something that he had no recollection of doing, and her instruction that a jury would require an explanation from him did affect the voluntariness his statement.

II. The trial court erred admitting state's exhibit 46, recording of 911 call, for the jury where the prejudicial value of the complainant hysterically screaming in the recording substantially outweighed any probative value of the evidence pursuant to Rule 403, SCRE.

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); *State v. Wilson*, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001); *State v. Wood*, 362 S.C. 520, 525, 608 S.E.2d 435, 438 (Ct. App. 2004). Appellate courts are bound by the trial court's factual findings unless they are clearly erroneous. *State v. Quattlebaum*, 338 S.C. 441, 454, 527 S.E.2d 105, 111 (2000); *State v. Williams*, 326 S.C. 130, 135, 485 S.E.2d 99, 102 (1997); *State v. Patterson*, 367 S.C. 219, 224, 625 S.E.2d 239, 241 (Ct. App. 2006); *State v. Landis*, 362 S.C. 97, 101, 606 S.E.2d 503, 505 (Ct. App. 2004).

Relevant facts

During Kimberly Cantwell's testimony the state offered state's exhibit 46, recording of the 911 call, into evidence.[7] R. 97, ll. 23-24. Defense counsel objected on three basis (1) bolstering, (2) Rule 403, SCRE, and (3) hearsay. R. 98, ll. 1-2. Defense counsel asserted they were not disputing the fact that Cantwell was attacked which is what makes the recording of the 911 call where you can hear Cantwell is "quite hysterical" substantially more prejudicial than probative. R. 98, l. 21-99, l. 5.

The state argued this evidence was not bolstering nor was it unduly prejudicial where it corroborated other evidence. The solicitor further asserted that it was important that the jury consider evidence of the nature of the attack and its impact. R. 99, ll. 9-24.

The court ruled the recording was admissible "for purposes of corroboration," and

7 State's 46, recording of the 911 call, is on file with this Court.

summarily found "there [was] more probative value than any unfair prejudicial effect to the defense." R. 101, l. 24-102, l. 11.

During Kowalski's testimony the state sought to admit further portions of state's exhibit 46, recording of the 911 call. R. 295, ll. 13-15. Defense counsel objected again on multiple grounds (1) cumulative, (2) hearsay, and (3) Rule 403, SCRE. R. 297, ll. 5-12. The court ruled the earlier portion should not be replayed. However, the court ruled that the remaining portion was admissible finding it was not hearsay but failed to address defense counsel's Rule 403 argument merely stating, "so noted." R. 297, l. 13-298, l. 2.

Discussion

The recording of the 911 call was inadmissible where the evidence had no probative value and any arguable probative value was substantially outweighed by its potential for being unfairly prejudicial.

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice ...." Rule 403, SCRE. "Unfair prejudice means an undue tendency to suggest decision on an improper basis." *State v. Wiles*, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009). "[T]he determination of prejudice must be based on the entire record, and the result will generally turn on the facts of each case." *State v. Stokes*, 381 S.C. 390, 404, 673 S.E.2d 434, 441 (2009).

"Courts must often grapple with disturbing and unpleasant cases, but that does not justify preventing essential evidence from being considered by the jury, which is charged with the solemn duty of acting as the fact-finder." *State v. Collins*, 409 S.C. 524, 535, 763 S.E.2d 22, 28 (2014). "[T]he standard is not simply whether the evidence is prejudicial; rather, the standard

under Rule 403, SCRE is whether there is a danger of unfair prejudice that substantially outweighs the probative value of the evidence." *Collins*, 409 S.C. at 536, 763 S.E.2d at 28.

The trial court abused its discretion in admitting state's 46, recording of the 911 call where the court failed to conduct a balancing test at all and instead summarily ruled the evidence was admissible for corroboration and that it was more probative than prejudicial. While the call was corroborative that Cantwell was hysterical that was not a fact in dispute. Additionally, Cantwell's reaction had been corroborated by testimony of her roommates and Shwarz. Appellant's defense was never that he was not there and did not commit this act his defense was that of involuntary intoxication. Cantwell's emotional state after the incident which is demonstrated in this recording had no probative link to the charges in this case. Thus, whether Cantwell was hysterical was not at issue in this trial and the use of the 911 recording where you can hear her screams and cries of horror had no probative value in this trial and any arguable probative value was substantially outweighed by the danger for unfair prejudice.

This Court recently addressed the admission of a 911 call in *State v. Davis-Kocsis*, 436 S.C. 468, 872 S.E.2d 415, (Ct. App. 2022), reh'g denied (May 25, 2022), cert. granted (Nov. 23, 2022). In that case this Court held the probative value of the 911 call was not substantially outweighed by the danger of unfair prejudice. *Id*. This Court reasoned "[t]he trial court did not abuse its discretion in admitting [s]tate's [e]xhibit 1 for corroborative purposes and establishing the elements of the offenses." *Id*. at 491, 872 S.E.2d at 427.

Unlike *Davis-Kocsis*, the evidence at issue is neither corroborative of a fact at issue nor necessary to establish an element of the offense. The jury rightfully heard from Cantwell of her absolute terror at having a stranger come in her room and strangle her. It heard from her roommates and Schwarz that she was hysterical after the incident. The state went too far when it

sought to admit this recording that portrayed the screams of Cantwell moments after the attack and this evidence was so unduly prejudicial that it suggested a verdict on the basis of emotion instead of the evidence.

CONCLUSION

By reason of the foregoing arguments, appellant requests this Court reverse his conviction and sentence and remand his case for a new trial.

Sarah E. Shipe
Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of January, 2024.

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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability 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."

Sarah E. Shipe
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

This 17th day of January, 2024.

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STATE OF SOUTH CAROLINA

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Honorable Donald B. Hocker, Circuit Court Judge

THE STATE,

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V.

CHAD LAVICTOR SIMMONS,

APPELLANT

APPELLATE CASE NO. 2022-001729

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Final Brief of Appellant in the above-referenced case has been served upon Andrew D. Powell, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 17th day of January, 2024.

Sarah E. Shipe
Appellate Defender

ATTORNEY FOR APPELLANT

From: Mcinnis, Sara
To: Andrew Powell
Cc: Shipe, Sarah; Grace Sommer
Subject: 2022-001729 The State v. Chad L. Simmons
Date: Wednesday, January 17, 2024 1:14:00 PM
Attachments: 2022-001729 The State v. Chad Simmons Final Brief of Appellant.pdf
AG Cover Letter - FBOA.pdf

Good Afternoon Mr. Powell,

Please find attached for service in the above case the Final Brief of Appellant, which will be filed with the Court of Appeals today, January 17, 2024, via email filing.

Thank you!

Sara McInnis
Administrative Assistant
South Carolina Commission on Indigent Defense
Appellate Division
(803) 734-1330