RECEIVED
Jan 18 2024
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court Of General Sessions
The Honorable Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2022-001729

THE STATE, Respondent,

v.

CHAD LAVICTOR SIMMONS, Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

ANDREW D. POWELL
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

101 Meeting Street
Charleston, SC 29401
(843) 958-1900

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

South Carolina Cases:

Other Cases:

Other Authorities:

STATEMENT OF ISSUES ON APPEAL

I. The trial court correctly admitted recordings of Appellant's interview with law enforcement because the statements were voluntary under a totality of the circumstances analysis.

II. The trial court correctly admitted a recording of Victim's 911 call, because it provided an account of what happened in real time, corroborated testimony, and did not support a decision on an improper basis.

STATEMENT OF THE CASE

A Charleston County Grand Jury indicted Appellant Chad Simmons for first degree burglary, assault and battery of a high and aggravated nature, and assault with intent to commit criminal sexual conduct. He proceeded to a jury trial on November 28, 2022, before the Honorable Donald B. Hocker. The Court granted Appellant's motion for directed verdict as to assault with intent to commit criminal sexual conduct. Simmons was convicted of first degree burglary and assault and battery of a high and aggravated nature. Appellant was sentenced to eighteen years' incarceration. This direct appeal follows.

STATEMENT OF FACTS

Kimberly Cantwell (Victim) was a student at the College of Charleston. (R. 81). She lived with three roommates: Kathryn, Harley, and Gwen. (R. 82). On the evening of September 19, 2018, Victim walked a block to a friend's house at around 9:00 PM to watch a show. (R. 89). Afterwards, Victim walked back to her house and laid down for sleep around midnight. (R. 90).

At around 3:00 AM, Chad Simmons (Appellant) entered Victim's apartment. (R. 221). Victim recalled waking up in the middle of the night with a "dark figure" opening her door, to which she said, "wrong room." (R. 91). Victim stated the intruder entered the room, shut the door, lunged at her, and pulled her onto the ground. (R. 91). After she was on the ground, the intruder strangled her from behind. (R. 93). Victim was hit on the head with a "hard object" and eventually lost consciousness. (R. 93-95).

Dan Schwarz, an overnight guest of Gwen, was awakened by Victim's screams. (R. 61). Kathryn described the screams as the "most horrific sounds I've heard." (R. 138). Schwarz testified he entered the room and saw the intruder on top of Victim. (R. 62). He further testified he grabbed the man and shoved him into the hallway. (R. 62). The intruder stated "wrong house" as the men engaged in a struggle that resulted in them tumbling down the stairs. (R. 62-63). Schwarz was able to rip off the shirt of intruder. (R. 64). During this altercation, Victim regained consciousness. (R. 95). Promptly after this occurred Victim and Harley called 911. (R. 96). Fingerprint evidence collected from the apartment lead police to arrest Appellant on September 22, 2018. (R. 4; 400).

ARGUMENT

I. The trial court correctly admitted recordings of Appellant's interview with law enforcement because the statements made were voluntary under a totality of the circumstances analysis.

The trial court correctly admitted Appellant's interview because his statements were voluntary under a totality of the circumstances, as evidenced by the fact that appellant waived his Miranda rights and voluntarily reinitiated his interview with police. This Court should affirm.

Relevant Facts

Appellant was arrested at around 1:00 AM on September 22, 2018. (R. 4). Officer Wolfsen and Detective Gertin began the interview in question at around 2:45 AM and it lasted approximately two hours. (R. 26). Officer Wolfsen was not the officer who arrested Appellant. (R. 4). Officer Wolfsen advised Appellant of his Miranda rights. (State's Exhibit 47, Video 1 at 42:30). Appellant initialed a paper indicating he was aware of these rights. (State's Exhibit 47, Video 1 at 42:31). Officer Wolfsen asked Appellant five times while informing Appellant of his rights if he understood them. (State's Exhibit 47, Video 1 at 42:30-50). Appellant was not handcuffed during the interview. (State's Exhibit 47, Video 1). Appellant was given water and used the restroom during the interview. (State's Exhibit 47, Video 2 at 16:32). Appellant never unequivocally stated he wanted to stop the interview. Appellant stated to the officers that on the night in question he went out drinking, spent time with a girl in her driveway, then walked to his brother's house. (State's Exhibit 47, Video 2 at 00:00). The officers left the interview room after taking this statement. (State's Exhibit 47, Video 3 at 00:00). After the officers left the interview room, Appellant knocked on the door and asked if he could speak with them again. (State's Exhibit 47, Video 3 at 2:50). Appellant stated to the officers that his previous statements contained inconsistencies. (State's Exhibit 47, Video 3 at 4:30, 7:40). Appellant stated he

remembered sitting on the couch in an apartment and later tumbling down the stairs. (State's Exhibit 47, Video 3 at 13:00).

Later, on September 25, 2018, officers interviewed Appellant again. (R. 19). Officers were under the impression Appellant wanted to speak with them because a relative of Appellant reached out to the police department. (R. 20). The officers stopped on the way to the interview and got Appellant something to eat. (R. 20). Officer Wolfsen read Appellant his Miranda rights and asked five times if Appellant understood them. (State's Exhibit 48, Video 1 at 22:00). Appellant also initialed a paper indicating he was aware of his rights. (State's Exhibit 48, Video 1 at 22:00). Appellant again recalled sitting on the couch in Victim's apartment and stumbling down the stairs. (State's Exhibit 48, Video 1 at 45:20, 51:00). Later in the interview, Appellant recalled seeing a woman in her bedroom. (R. 32). The interview lasted around two hours and concluded with Appellant writing an apology letter. (R. 32).

Defense counsel objected to the admission of these interviews on the basis that the interview was involuntary under the totality of the circumstances. (R. 34). Defense also raised S.C. Code § 17-13-50, arguing that the officer should have informed Appellant earlier in the interview what he would be charged with. (R. 34). The statute makes it unlawful for an officer who arrests or detains, to refuse to answer a question relative to the reason for arrest. S.C. Code § 17-13-50. The State responded by claiming that there is no constitutional or statutory requirement that a person be briefed on charges or evidence prior to an interrogation. (R. 35). The Court found that the statements were voluntary, and that the statute raised by the defense did not provide a remedy[1] of suppression. (R. 43).

[1]The remedy is the statute created a criminal offense for which an officer can be prosecuted.

Standard of Review

In criminal cases appellate courts sit to review errors of law. State v. Asbury, 328 S.C. 187, 193, 493 S.E.2d 349, 352 (1997). The test regarding the admissibility of a confession is voluntariness. State v. Von Dohlen, 322 S.C. 234, 243, 471 S.E.2d 689, 694 (1996) ("confession is not admissible unless it was voluntarily made."). The voluntariness of a confession is determined by examining the totality of the circumstances. Id. at 243, 471 S.E.2d at 694–95. On appeal, the appellate court reviews the trial court's determination without reassessing the facts. Rather, an appellate court determines whether the trial court's factual findings are supported by any evidence. State v. Miller, Op. No. 28178 (S.C. Sup. Ct. filed Sep. 13, 2023). The ultimate legal determination of whether a statement was voluntarily made is a question of law subject to *de novo* review. Id.

Discussion

This Court should affirm the trial court's ruling. The statements in question were voluntary under a totality of the circumstances because Appellant was read his rights, initialed the paper detailing them, was offered food, drink, and bathroom breaks, yet insisted on telling police his version of events.

In State v. Crawley, this Court held that the failure of law enforcement to inform defendant that she was the subject of questioning before she waived her Miranda rights did not change the voluntariness of her statements. State v. Crawley, 349 S.C. 459, 463–64, 562 S.E.2d 683, 685 (Ct. App. 2002). In Crawley, the Officer did not tell defendant she was the subject of the investigation before she arrived at the Sheriff's Department or before she signed the Miranda waiver. Id. 349 S.C. at 463–64, 562 S.E.2d at 685. This Court noted: "[W]e 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.'" Id. 349 S.C. at 463, 562 S.E.2d at 686. In State v. Miller, the South Carolina Supreme Court outlined the following factors for determining whether a confession was voluntary:

> 1. The youth and maturity of the accused; 2. the accused's lack of education or low intelligence; 3. the failure to advise the accused of his constitutional rights, particularly the rights to remain silent and have counsel present; 4. the presence of a written waiver signed by the accused regarding his constitutional rights; 5. the physical condition of the accused, including whether the accused was intoxicated at the time of the interrogation; 6. the mental health of the accused; 7. the length of the interrogation; 8. the location of the interrogation; 9. the continuity of the interrogation; 10. the repeated or prolonged nature of the interrogation; 11. the use of physical punishment, including both physical brutality as well as the deprivation of food or sleep; 12. whether law enforcement offered specific promises of leniency, rather than general remarks that a cooperative attitude would be to the accused's benefit; and 13. whether law enforcement made deliberate misrepresentations of the evidence against the accused.

State v. Miller, Op. No. 28178 (S.C. Sup. Ct. filed Sep. 13, 2023) (Adv. Sh. at 21). The Miller court deemed a confession voluntary by applying the above factors. The Court noted no factor was dispositive and that the factors should be considered together. Id. The Court was persuaded by the fact that defendant was advised of his rights, was asked if he understood them before signing a waiver, was not handcuffed during the interrogation, was only interviewed for two hours, the interrogation was in the afternoon, officers did not make misrepresentations or promise leniency, officers did not threaten or punish defendant, officers did not deprive defendant of food, water, or restroom breaks, defendant did not appear to be under the influence of drugs or alcohol, defendant was laughing and joking under his own free will, and defendant never stated that he wanted to stop the interview. State v. Miller, Op. No. 28178 (S.C. Sup. Ct. filed Sep. 13, 2023) (Adv. Sh. at 26).

Similarly in State v. Von Dohlen, the South Carolina Supreme Court found defendant's statements to be voluntary under a totality of the circumstances approach. State v. Von Dohlen,

322 S.C. 234, 245, 471 S.E.2d 689, 696 (1996), overruled on other grounds by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019). The Court relied on the facts that defendant was repeatedly read his rights, was not overborne by police, was questioned from 7:00 to 10:00 PM, was permitted to use the restroom and phone, and was not threatened or coerced. State v. Von Dohlen, 322 S.C. 234, 253, 471 S.E.2d 689, 700 (1996).

The facts of this case support a finding that Appellant's statement was voluntary. Like Von Dohlen, Appellant was repeatedly read Miranda rights, was questioned in approximately three-hour segments, was permitted to use the bathroom, and was not threatened or coerced. Further, the factors applied in Miller support the same finding. At the time of the interview, Appellant was twenty-nine years old. (State's Exhibit 47, Video 1 at 38:00). Appellant was described as a "fairly intelligent individual" who had a GED and some college education. (R. 12-13). Appellant was offered snacks, drinks, and bathroom breaks. (R. 13). Officer Wolfsen explained, in both interviews, Appellant's rights to him one by one and had Appellant initial next to each right. (R. 10-11). At the time of interrogation Appellant did not appear to be intoxicated or under the influence of narcotics. (R. 13). The record does not support a finding that Appellant was suffering from mental health issues at the time of the interview. (R. 13). The interviews each lasted around two to three hours consistent with the interview length in Von Dohlen. Officer Wolfsen made no promises of leniency, made no threats of violence, and made no intentional misrepresentations. (R. 15).

As noted in Crawley, failure of law enforcement to inform defendant he is the suspect of questioning does not change the voluntariness of defendant's statements. Appellant claims that officers' failure to comply with S.C. Code § 17-13-50 renders his confession involuntary. The statute explicitly applies to the arresting or detaining officer. Officer Wolfsen was not the officer

that arrested Appellant. (R. 4). Regardless, the statute does not provide a remedy in the form of suppression. The fact is merely one considered in the totality of circumstances. As noted in Miller, no one factor is dispositive. The factors considered collectively support a finding that both statements given by Appellant were voluntary.

Even if the Appellant was not given proper Miranda warning, he reinitiated the interrogation voluntarily. An accused can be subjected to further questioning if the accused initiates further communication with the police. Edwards v. Arizona, 451 U.S. 477, 485, 101 S. Ct. 1880, 1885, 68 L. Ed. 2d 378 (1981).

In the first interview, Appellant voluntarily reinitiated the interview when he knocked on the door and asked if he could speak with the officers again so he could change his story. (State's Exhibit 47, Video 3 at 2:50). In the second interview, Appellant reinitiated the conversation through a family member. (R. 20). This Court should affirm, because the statements made were voluntary under a totality of the circumstances analysis.

II. The court correctly admitted a recording of Victim's phone call to 911 because it provided an account of what happened in real time, corroborated testimony, and did not support a decision on an improper basis.

The court correctly admitted the recording, because the probative value of the 911 call was not substantially outweighed by the danger of unfair prejudice. The call gave an account of the event in real time, corroborated testimony of multiple witnesses, and does not support a decision on an improper basis. This Court should affirm.

Relevant Facts

Shortly after the incident, Victim called 911 with her roommate Harley. (R. 96). Victim testified the recording was a fair and accurate representation of that call. (R. 97). On the call Victim is "hysterically crying" and "pretty unable to form sentences." (R. 97). Nonetheless, the call contained statements that intruder broke into Victim's house, that he attempted to strangle her, that intruder left behind his shirt, and that intruder was black. (State's Exhibit 36 at 00:30, 3:20). Defense objected to the introduction of this evidence on the grounds that it was bolstering, hearsay, and inadmissible under Rule 403, SCRE. (R. 97-100). The State argued that the call corroborated the testimony introduced at trial, that it was her instant impression, and that it was probative. (R. 97-100). The Court admitted the evidence due to its ability to corroborate testimony. (R. 101).

Standard of Review

In criminal cases, appellate courts sit to review errors of law. State v. Asbury, 328 S.C. 187, 193, 493 S.E.2d 349, 352 (1997). The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice. State v. Douglas,

369 S.C. 424, 429, 632 S.E.2d 845 (2006). A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. State v. Adams, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003). Great deference is given to the trial court's judgment. State v. Hamilton, 344 S.C. at 357, 543 S.E.2d at 593 (2001).

Discussion

Probative value is the tendency of evidence to establish the proposition it is offered to prove. State v. Thompson, 420 S.C. 386, 398 803 S.E.2d 44, 50 (Ct. App. 2017). It is the weight that a piece of evidence will carry in helping the jury make a determination. "The more essential the evidence, the greater its probative value." Id. "All evidence is meant to be prejudicial; it is only unfair prejudice which must be avoided." State v. Bratschi, 413 S.C. 97, 115, 775 S.E.2d 39, 49 (Ct. App. 2015). Evidence that is unfairly prejudicial is evidence that suggests a decision on an improper basis. State v. Holder, 382 S.C. 278, 290, 676 S.E.2d 690, 697 (2009) (quoting State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991)).

In State v. Davis-Kocsis, this Court upheld the admission of a 911 call recording for the purposes of corroboration. State v. Davis-Kocsis, 436 S.C. 468, 474, 872 S.E.2d 415, 418 (Ct. App. 2022). In Davis-Kocsis, defendant was charged with murder, kidnapping, and burglary. Id. Defense moved to suppress a recording of the 911 call of victim requesting emergency services. Id. Defense raised Rule 403, SCRE arguing that the call would stir up the passions of the jury. This Court found that the trial court did not abuse its discretion in admitting the call for purposes of corroboration. State v. Davis-Kocsis, 436 S.C. at 475 872 S.E.2d at 418. This Court explained that the 911 call recording "provid[ed] an account of what happened in real time", and the call

identified defendant as being part of the group that broke into the home. State v. Davis-Kocsis, 436 S.C. at 491 872 S.E.2d at 427.

Similarly, the Fourth Circuit Court of Appeals has upheld the introduction of a 911 call over a 403 objection. United States v. Williams, 446 F. App'x 587, 592 (4th Cir. 2011). The Court's reasoning for doing so was because the call was the only available description of the crime and defendant, and the judge "excluded the more gruesome and prejudicial portions of the recording." Id.

Other jurisdictions have admitted 911 recordings as well, including the Utah Court of Appeals. State v. C.D.L., 250 P.3d 69, 80 (Utah Ct. App. 2011). The Court explained that the recording of the 911 call is more probative than prejudicial, because it demonstrated wife's emotional state, labelled wife as a victim of the crime, and "substantiated the Witnesses' testimonies by corroborating the details they testified to and their impression that this was a frightening situation." Id. The court also noted that 911 call was prejudicial to the defense, but not unfairly prejudicial, because it did not support "a decision on an improper basis." Id.

The call had high probative value as an excited utterance. An excited utterance is a statement regarding a startling event while the declarant was under the stress of excitement caused by that event. State v. Heath, 433 S.C. 506, 515, 860 S.E.2d 673, 678 (Ct. App. 2021). These statements are admissible as a hearsay exception, because there is inherent reliability associated with "spontaneous excitement which suspends the declarant's powers of reflection and fabrication." State v. Blackburn, 271 S.C. 324, 327, 247 S.E.2d 334, 336 (1978).

Failure to conduct an on-the-record 403 analysis will not result in a reversal of the conviction if the trial judge's comments concerning the matter indicate he was cognizant of the

evidentiary rule when making a ruling. State v. King, 349 S.C. 142, 156, 561 S.E.2d 640, 647 (Ct. App. 2002). In State v. Collins, the plurality opinion found the trial court's 403 analysis was sufficient. The analysis was deemed sufficient because the record showed the trial court thoroughly considered the arguments of both parties, examined each piece of evidence, and examined the photographer before making its decision. State v. Collins, 409 S.C. 524, 535, 763 S.E.2d 22, 28 (2014) (Beatty, J., Plurality).

In the case *sub judice*, the court properly found that the probative value of the recording was not substantially outweighed by the danger of unfair prejudice. The Court adequately considered the evidence, because it cited the proper evidentiary rule and noted the probative value of corroboration. (R. 98-101). First, the call gives an account of what happened in real time, like Davis-Kocsis. (State's Exhibit 46 at 00:30). The statements made to the 911 operator are inherently reliable because the callers' ability to reflect and fabricate are limited. Next, the call contains corroborating statements from both Victim and her roommate as to the injuries sustained, details about the intruder, evidence left at the scene, and witnesses present. (State's Exhibit 46). Lastly, nothing in the call supports a decision on an improper basis. Thus, the trial court properly admitted the testimony. This Court should affirm.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

ANDREW D. POWELL
Assistant Attorney General

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

BY: _____
Andrew D. Powell
Bar # 106415

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

January 18, 2024

RECEIVED
Jan 18 2024
SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court Of General Sessions
The Honorable Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2022-001729

THE STATE, Respondent,

v.

CHAD LAVICTOR SIMMONS, Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies this Final Brief of Respondent 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."

ALAN WILSON
Attorney General

ANDREW D. POWELL
Assistant Attorney General

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

By: Andrew D. Powell
Andrew D. Powell
Bar # 106415

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 743-3727

ATTORNEYS FOR RESPONDENT

January 18, 2024

RECEIVED
Jan 18 2024
SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court Of General Sessions
The Honorable Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2022-001729

THE STATE, Respondent,

v.

CHAD LAVICTOR SIMMONS, Appellant.

PROOF OF SERVICE

I, Grace Sommer, certify that I have served the within Final Brief of Respondent on Sarah E. Shipe, Esquire, counsel of record for the Appellant, by electronic mail to the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served.

This 18th day of January, 2024.

Grace Sommer
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727