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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions

The Honorable D. Craig Brown, Circuit Court Judge

Case No. 2021-000457

State of South Carolina……Respondent,

Christopher P. Cooper……Appellant.

PETITION FOR REHEARING

Pursuant to SCACR Rule 221, Petitioner respectfully asks this Court to rehear his case. Respectfully, this Court has overlooked or misapprehended issues of law that require the Court to grant this petition.

RELEVANT FACTS

Appellant was tried along with his co-defendant and cousin, Craig Cooper for the home invasion of a suspected drug dealer and then the rape of his girlfriend. In connection with its investigation of the crime, law enforcement spoke to Craig Cooper who was identified as being present at the scene due to a CODIS hit. ROA 639. Craig Cooper told law enforcement that Appellant was with him during these crimes. ROA 146, 701. Initially, law enforcement pursued two other suspects. ROA 637-38.

Law enforcement located Appellant at his family's car dealership, and he returned to the West Columbia police station with them. There, he was interrogated and ultimately offered a

statement that implicated himself in the crime. Law enforcement also identified Appellant's DNA on a paper towel found in the home. ROA 1001.

At trial, Craig Cooper, who initially had agreed to cooperate with law enforcement and testify against Christopher Cooper, invoked his rights under the Fifth Amendment and refused to testify. ROA 555.

What the jury did not hear, and is discussed in greater detail below, is that after this purported home invasion, the complainant approached Appellant's brother and requested money.

Appellant did not testify at trial and the defense did not offer any witnesses and was subsequently convicted.

ARGUMENT

I. The trial court erred in not allowing Appellant to offer evidence that the purported victim approached Appellant's brother and requested money when that evidence was relevant and was admissible to impeach her testimony pursuant to SCRE, Rule 404(b).

A significant portion of the pre-trial motions was dedicated to the admission of allegations or statements of "bribery" as it pertained to the Complainant and Appellant's brother. ROA, ll. 20-21. The State claimed that Appellant's brother offered the Complainant money at her place of employment, she informed the Solicitor's Office of the contact and her fear of Appellant's brother, and then reneged on her fear of the contact after other meetings with Appellant's brother. ROA 110; 111, l. 22. Appellant's brother in turn alleged Complainant was trying to bribe him so she would drop the charges against Appellant. ROA 112. The State claimed that the contact and allegations between the two were irrelevant because it was unrelated to the home invasion and sexual assault. ROA 113-114.

Trial counsel argued that the allegations of bribery were relevant for impeachment of Complainant's testimony under SCRE, Rule 404. ROA 115, ll. 12-18. Trial counsel argued:

> Judge, its' a question of fact for the jury in regards to her character only. The big reason why this is important, Your Honor, is that, obviously, in *State v. Finley*, which is a 1989 case, an old case,[1] dealing with extortion. It was a sex case, believe it or not, like a sexual rape case. And they found that they could talk about what had occurred by this-- the guy was going to testify that he had had sex with her or something like-- which is terrible; it was in violation of the rape shield statute.
>
> But they allowed the case to come in because it felt like it was establishing motive, bias, and prejudice on the part of the prosecuting witnesses.

ROA 117, l. 13- 118, l. 1.

Trial counsel also informed the court of recordings made by Complainant and her sister of conversations with Appellant's brother. ROA 124. In turn, the State informed the trial court that recordings also existed of Appellant's brother's statements to investigators about the alleged bribery. ROA 125. As a result, trial counsel additionally argued:

> MR. WILLIAMS: … I'm a pretty straight guy. I think there was talk of money. And I think that the impression, clear impression, from my client, was that if he-- from my client's brother, I should say, that if he paid her like $25,000 and these charges were going to go away, he was going to help in some way.
>
> The e-mail deal comes in because that was presented as evidence that she was trying to help. I don't know why the email comes in except for that reason. It's like some song and dance going on between these two parties, Your Honor. Clearly, one party didn't trust the other party; there's no question about that.

ROA 126, ll. 13-25.

After taking the issue under advisement, the Court granted the State's motion to suppress any mention of the bribery scheme. ROA 131-132; 254-260.

[1] *State v. Finley*, 300 S.C. 196, 387 S.E.2d 88 (1989).

The trial court erred in suppressing any mention of the bribery or extortion to be used for impeachment purposes and it was relevant and probative of the complainant's credibility. Appellant's co-Defendant told law enforcement that he and Appellant had engaged in consensual sexual activity with Complainant. ROA 521, 798. It was the main purpose of the jury to determine if the sexual contact was consensual or criminal sexual conduct. Therefore, the Complainant's credibility was highly important and evidence of possible extortion by her should have been introduced.

The South Carolina Supreme Court has considered a similar scenario involving an extortion attempt against a defendant and found that such evidence was highly credible. In State v. Finley, 300 S.C. 196, 387 S.E.2d 88 (1989), the victim attempted to extort the appellant and the attempt was captured on tape recording. The victim testified that the appellant's girlfriend had called her and told her she would pay her $1000 to drop the charges. The victim, however, called the appellant's girlfriend (which was tape recorded without the victim's knowledge) and offered to drop the charges in exchange for $1000 (she wanted $20 that night). Appellant's counsel in *Finley* sought to introduce the tape recording to impeach the victim's testimony. The judge ruled it was inadmissible because it was irrelevant and improper. The Court held the evidence was admissible because it was relevant on the issues of (1) whether the appellant tried to obstruct justice, or (2) whether the prosecuting witness was attempting to extort money. *Finley*, 300 S.C. at 199. "It is well settled that evidence is relevant and admissible if it tends to establish or make more or less probable some matter in issue and to bear directly or indirectly thereon. The evidence need not be sufficient in itself to establish the whole or any definite portion of a party's contention." *Id. See also Associate Management, Inc. v. E.D. Sauls Construction Company*, 279 S.C. 219, 305 S.E.2d 236

(1983); *Gause v. Livingston*, 251 S.C. 8, 159 S.E.2d 604 (1968); *Drayton v. Industrial Life & Health Ins. Co.*, 205 S.C. 98, 31 S.E.2d 148 (1944); *S.C. Department of Social Services v. Bacot*, 280 S.C. 485, 313 S.E.2d 45 (S.C. Ct. App. 1984). *See also Commonwealth v. Corcoran*, 252 Mass. 465, 148 N.E. 123 (1925) (finding a general plot or scheme to obtain money by threats to accuse persons of a crime bears on the credibility of a witness).

Based on prior precedent, is it clear the trial court erred in suppressing highly relevant and probative evidence directly related to a testifying prosecuting witness. Appellant and his co-Defendant asserted that the sexual contact was consensual, while the Complainant asserted the sexual contact was not consensual. Therefore, the nature of the contact turned on the statements of Appellant and the Complainant and the jury would have to decide who was more credible.

Based on the foregoing argument above, Appellant respectfully asks this Court to find the reversible error by the trial court and reverse Appellant's convictions and sentences.

II. The trial court erred in not suppressing Appellant's statements when they were involuntarily given to law enforcement.

Since Appellant's interview with law enforcement was not audio or video recorded, the parties held a pre-trial hearing under *Jackson v. Denno*, 378 U.S. 368, 8 S.Ct. 1774 (1964). Investigators from the West Columbia Police Department (WCPD) testified that they found Appellant at his place of employment and took him back to the police station for an interview. ROA 147-148. Investigators testified that Appellant was read his *Miranda* rights[2] and there was no coercion or force in getting Appellant's statement. ROA 149-150.

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

Investigator Morris of the WCPD testified that it was departmental policy at the time to not record suspect interviews and that alternative methods of video and audio recordings of interviews will only be conducted if the suspect cannot read or write. ROA 166-167. Captain Bruce Wade of the WCPD further added that statements were not recorded due to the budget of the department and that the non-recording policy had been in place since at least 2005. ROA 751; 763. Cameras are present in the interrogation room, but the footage is not stored, rather fed into a live loop in the supervisor's office for them to view. ROA 167-168. Investigator Morris was the only live witness to Appellant's statement and stated that Appellant never requested a lawyer. ROA 192; 195.

Appellant testified and noted that he also spoke with Captain Wade during his interrogation. ROA. 197. Appellant stated he told the officers who came to the car dealership that he did not have anything to say and that he wanted a lawyer. ROA 197-98. Once they got to the police department, he told Putney he needed a lawyer with him. ROA 198. Appellant testified Putney keep trying to pull him out a little bit. ROA 198, l. 9. Then, the third officer entered the interrogation room "guns blazing, yelling--." ROA 198, l. 12. One of the officers threatened Appellant-- "He was, oh, well, had it been me, you know, I'd have killed you, you know, this, that, and the third… ROA 199, ll. 5-10.

Appellant further testified:

> I don't have a clue what you're talking about, sir, but I need a lawyer present. It's a totally different world for me. I was just taken from work into an interrogation room. Super nervous. He left. I was still holding to it, my word of needing a lawyer present. He went. And I guess that's his supervisor that he went and got. Supervisor came in there with a totally different tone--

ROA 199, ll. 12-20.

After meeting with Captain Wade, Appellant testified he had to be escorted to the restroom because he lost his bowels. ROA 201. Appellant reiterated that he asked for a lawyer but that the officers would not listen. ROA 200-201. He was provided his Miranda warnings after he was taken to booking, and after they obtained a buccal swab from him. ROA 201-202.

The law is clear that involuntary confessions cannot be used in court as 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."' *State v. Pittman*, 373 S.C. 527, 565, 647 S.E.2d 144, 164 (2007) (quoting *Haley v. Ohio*, 332 U.S. 596, 607 (1948) (Frankfurter, J., concurring).

In determining whether a confession was given "voluntarily," this 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 indicated, 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). No one factor is determinative, but each case requires careful scrutiny of all surrounding circumstances. *Id. See also State v. Moultrie*, 273 S.C. 60, 254 S.E.2d 294 (1979) (a waiver of *Miranda* rights is determined by the totality of the circumstances).

Once an accused requests counsel, police interrogation must cease unless the accused himself "initiates further communication, exchanges, or conversations with the police." *Edwards v. Arizona*, 451 U.S. 477, 485 (1981). Interrogation is the express questioning, or its functional equivalent which includes "words or actions on the part of the police… that the police should know are reasonably likely to elicit an incriminating response." *State v. Sims*, 304 S.C. 409, 417, 405 S.E.2d 377, 381 (1991) (citing *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980)).

The trial court erred when it found that Appellant's involuntary statement could be introduced as evidence against him in the trial. Appellant was clear about his want for legal counsel and law enforcement's failure to provide him with counsel and stop the interrogation. Law enforcement's assertions of voluntariness cannot be corroborated because of their "policy" to not record interviews with suspects. Therefore, the State failed to show Appellant's statements were made knowingly and voluntarily and such statements should have been suppressed.

Based on the foregoing argument above, Appellant respectfully asks this Court to find the reversible error by the trial court and reverse Appellant's convictions and sentences.

III. The trial court judge erred in allowing the complainant to testify that she recognized Appellant's voice from the bond hearing since the identification procedure was unnecessarily suggestive and conducive to irreparable misidentification.

Trial counsel objected when Complainant testified regarding the identification of Appellant's voice from his bond hearing. Trial counsel stated:

> MR. WILLIAMS: The objection goes to the identification of my client as being in bond court and saying that her voice-- that she recognized the voice from that day, because there was no type of test, no type of procedure that was done to see whether it sounded like this person versus another person. She put his character at issue by

> saying he's been arrested. . . she can't today probably say that it's his voice. It may sound like his voice.

ROA 408, ll. 3-19.

The trial court did not hear argument from the State and found the identification admissible under SCRE Rule 901(b)(5). ROA 408-409. The trial court further relief on *State v. Plyer*, 275 S.C. 291, 270 S.E.2d 126 (1980) and *State v. Smith*, 307 S.C. 376, 415 S.E.2d 409 (1992), which held that no special qualifications are required to testify regarding matching the voice of a perpetrator to a defendant. ROA 417. The trial court explained that "[t]he only foundation that needs to be laid is that the witness recognizes the voice of the defendant and has a basis to compare his voice with that of the perpetrator, which further goes to the Court's prior ruling." ROA 417, ll. 21-25. The Complainant was then allowed to testify that the voice of the "skinnier guy" from the night of her attack was the same as Appellant, whom she heard at bond court. ROA 418-19.

Such an identification was inherently suggestive, and the trial court erred in not considering the reliability of the identification, instead focusing only on authentication. A criminal defendant may be deprived of due process of law by an identification procedure which is unnecessarily suggestive and conducive to irreparable mistaken identification. *Stovall v. Denno*, 388 U.S. 293 (1967). An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification. *Manson v. Brathwaite*, 432 U.S. 98 (1977) (citing *Simmons v. United States*, 390 U.S. 377 (1968)). There is no question but that the identification procedure here was unnecessarily suggestive and conducive to irreparable misidentification-- it was Appellant's bond hearing. He was handcuffed and in police custody when she heard his voice. Just as it would be improper to allow an in-court

photographic identification undertaken in these circumstances, so too it was improper to allow an audio identification into evidence without a full vetting of the reliability of the identification.

Based on the foregoing argument above, Appellant respectfully asks this Court to find the reversible error by the trial court and reverse Appellant's convictions and sentences.

CONCLUSION

Respectfully, this Court should grant rehearing.

Respectfully submitted,

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August 21, 2024

CERTIFICATE OF SERVICE

Counsel hereby certifies she has served a copy of this petition for rehearing on Mark Farthing of the South Carolina Attorney General's Office via email at mfarthing@scag.gov on this date, **August 21, 2024**.

/s/ Elizabeth Franklin-Best