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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

Kristi Harrington, Circuit Court Judge

Case Nos.: 2010GS1008190 and 2010GS1008191
Appellate Case No.: 2012-213248

THE STATE OF SOUTH CAROLINA .....Respondent,

v.

DENORRIS HALL .....Appellant.

INITIAL BRIEF OF APPELLANT DENORRIS HALL

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STATEMENT OF ISSUES ON APPEAL

I. **Did the trial court err in denying Appellant's Motion to Dismiss the case for a mistrial based on violation of Appellant's due process rights under Rule 5 and *Brady v. Maryland*?**

II. **Did the trial court err in admitting Appellant's statement into evidence?**

III. **Did the trial court err in denying Counsel for Appellant's the opportunity to argue last during closing in violation of the Appellant's equal protection rights?**

STATEMENT OF THE CASE

On December 7, 2010, the Charleston County Grand Jury indicted Denorris Hall ("Hall") on charges of attempted robbery and attempted murder. On October 15, 2012, Hall proceeded to trial before the Honorable Kristi Harrington. Hall was represented by Andrew Grimes and Megan Ehrlick. On October 17, 2012, a jury returned a verdict of guilty to all charges as indicted. Judge Harrington sentenced Hall to twenty years, on each of the attempted armed robbery and attempted murder charges. Both charges are to run concurrently. Hall's attorney timely filed a Notice of Appeal. This appeal follows.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS THE CASE FOR A MISTRIAL BASED ON VIOLATION OF APPELLANT'S DUE PROCESS RIGHTS UNDER RULE 5 AND *BRADY V. MARYLAND.*

On September 13, 2010, Absalom Thomas ("Thomas") went to a convenience store near the intersection of McMillan and Spruill Streets in Charleston County to purchase a beer. As Thomas left the store to return home, a black male approached him and asked for a cigarette. Thomas testified that as he was handing the man a cigarette, the man grabbed Thomas' hand and searched his pockets. Thomas realized he was being robbed. (Tr. p. 110, lines 1-7.) Thomas testified that as he attempted to flee the scene, two men followed him shooting him twice. (Tr. p. 110, lines 11-17). At trial, the solicitor asked Thomas if he recognized who shot him and if that person was present in court. After Thomas responded in the affirmative, counsel for Appellant objected because counsel was unaware that Thomas could identify his shooter. (Tr. p. 119, lines 1-22.)

The trial court allowed Thomas to proffer testimony regarding his identification of the shooter. Thomas testified that he recognized the shooter as Hall and identified Hall in the courtroom. (Tr. p. 124, lines 7-16.) In the presence of the jury, the trial court ruled that Thomas could identify Hall as the shooter. (Tr. p. 128, line 23 – p. 129, line 13.) The trial court allowed Appellant's counsel to preserve all motions regarding the nondisclosure of possible identification until the completion of Thomas' testimony. (Tr. p. 127, lines 17 – p. 128, line 1.)

Appellant's counsel moved for a mistrial based upon the State's failure to disclose that Thomas could identify Hall as the shooter. (Tr. p. 162, lines 2-5.) Counsel for

Appellant argued that by failing to disclose this information, Hall was not afforded the "opportunity to make a meaningful decision on plea offers." (Tr. p. 162, lines 8-9.) Further, Appellant's counsel contended that the discovery in the case consistently identified the suspects only as "two black males, one was taller and the other person wearing dark clothes." (Tr. p. 164, lines 3-4.) Prior to trial, there was never any indication from the State that anyone could positively identify the shooter, and in fact, co-Defendant Herman Smith admitted that he was the shooter. (Tr. p. 164, lines 4-9.)The trial court has discretion to grant or deny a motion for a mistrial, and the "court's decision will not be disturbed an appeal absent an abuse of discretion amounting to an error of law." *State v. Culbreath*, 377 S.C. 326, 331, 659 S.E.2d 268, 271 (Ct. App. 2008). A mistrial should be granted only when absolutely necessary. *State v. Council,* 335 S.C. 1, 13, 515 S. E.2d 508, 514 (1999). To be granted a mistrial, a defendant must show both error and resulting prejudice. *Id.*

Rule 5 South Carolina Rules of Criminal Procedure provides that the prosecution shall permit the defendant, upon request, to inspect and copy any documents, examinations, tests which are in the control of the prosecution which the prosecution intends to use as evidence in chief at trial. A Rule 5 violation is not reversible unless prejudice is shown. *State v. Landon*, 370 S.C. 103, 108, 634 S.E.2d 660, 663 (2006). In *Brady v. Maryland*, 373 U.S. 83 (1963), the United State Supreme Court declared the suppression of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. 373 U.S. at 87. The overriding theme of the *Brady* cases is the emphasis the Supreme Court has placed on the prosecutor's responsibility for fair

play. *Riddle v. Ozmint*, 369 S.C. 39, 46, 631 S.E.2d 70, 76 (2006) (citing *Kyles v. Whitley*, 514 U.S. 419 (1995)).

An individual asserting a *Brady* violation must demonstrate that evidence: (1) is favorable to the accused; (2) in the possession of or known by the prosecution; (3) was suppressed by the state; and (4) was material to the accused's guilt or innocence or was impeaching. *Riddle*, 369 S.C. at 44, 631 S.E.2d at 73 (citing *Kyles v. Whitley*, 514 U.S. 419 (1995); *Gibson v. State*, 334 S.C. 515, 514 S.E.2d 320 (1999)). The South Carolina Supreme Court applied this standard in *Riddle* and the Court ruled that if a *Brady* violation occurred, post-conviction relief must be granted. *Riddle*, 369 S.C. at 44, 631 S.E.2d at 73.

The *Brady* disclosure rule is grounded in a defendant's fundamental right to a fair trial mandated by the Due Process clause of the Fifth and Fourteenth Amendments. *State v. Kennerly*, 331 S.C. 442, 451, 503 S.E.2d 214, 219 (Ct. App. 1998). The burden is on the solicitor to disclose material evidence which is exculpatory or impeaching. *Id.* at 452. Evidence is material under *Brady* if there is a reasonable probability that the result of the proceeding would have been different had the information been disclosed. *Id.*

In the present case, Hall is prejudiced by the fact that Thomas, the victim in the case, could positively identify Hall as the shooter, but failed to do so prior to trial. Given the fact that the co-Defendant admitted to shooting Thomas and there was no additional evidence in discovery to the contrary, Hall was unaware of the potential that Thomas would identify Hall as the shooter. Additionally, as defense counsel argued, had Hall been aware of the possible identification, Hall could have had the opportunity to hire an expert and more properly develop his cross examination thus affording Hall a more

complete defense. The trial court therefore erred in allowing the in-court identification because the identification at trial was not properly disclosed prior to trial and therefore violates both Rule 5 and *Brady v. Maryland.*

II. THE TRIAL COURT ERRED IN ADMITTING THE APPELLANT'S STATEMENT INTO EVIDENCE.

The decision of the trial court to admit evidence will not be disturbed absent an abuse of discretion. *State v. Pagan,* 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.; see also State v. Wise,* 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004).

With regard to a *Miranda* warning, the court in *State v. Williams*, 405 S.C. 263, 747 S.E. 2d 194 (2013) concluded:

> The State may not use statements stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. Custodial interrogation entails questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. Interrogation can be either express questioning or its functional equivalent and includes words or actions on the part of police (other than those normally attendant to arrest and custody) the police should know are reasonably likely to elicit an incriminating response.

Williams, 405 S.C. at 272-273, 747 S.E. 2d at 199 (internal citations omitted).

The purpose of *Miranda* is to apprise a defendant of his constitutional privilege not to incriminate himself while in the custody of law enforcement. *Miranda,* 384 U.S. 436, 444 (1966). Law enforcement must inform a suspect of his Miranda rights "after a person has been taken into custody or otherwise deprived of his freedom of action in any way." *Id.* To determine whether a suspect is in custody, the trial court must examine the

totality of the circumstances, which include factors such as the place, purpose, and length of interrogation, as well as whether the suspect was free to leave the place of questioning. *Bradley v. State*, 316 S.C. 255, 257, 449 S.E.2d 492, 493-94 (1994). The custodial determination is an objective analysis based on whether a reasonable person would have concluded that he was in police custody. *Id.* at 257, 449 S.E.2d at 493-94 (internal citations omitted).

In *Miranda*, the Supreme Court concluded that "the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." *Miranda*, 384 U.S. at 467. "*Miranda* conditioned the admissibility at trial of any custodial confession on warning a suspect of his rights: failure to give the prescribed warnings and obtain a waiver of rights before custodial questioning generally requires exclusion of any statements obtained." *Missouri v. Seibert,* 542 U.S. 600, 608 (2004).

In the present case, Hall was transported to North Charleston City Hall by law enforcement for questioning regarding another incident. (Tr. p. 67, lines 7-8.) Hall was eighteen years old at the time. Detective Mark Evans testified, during the *Jackson v. Denno* hearing,[1] that when Hall began to provide a written statement regarding the alleged incident, the other law enforcement officer in the room, Sergeant Hill, immediately began asking Hall about the incident in question. (Tr. p. 67, lines 22-24.) Detective Evans testified that when Hall placed himself in the vicinity of the incident, the

[1] *Jackson v. Denno,* 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964) provides that a defendant in a criminal case is entitled to an evidentiary hearing on the voluntariness of statements made by the defendant prior to submission of such statements to the jury. Where there is conflicting evidence regarding the statements, the court must make a finding as to their validity. *State v. Silver,* 307 S.C. 326, 330, 414 S.E.2d 813, 815 (Ct. App. 1992) *aff'd as modified*, 314 S.C. 483, 431 S.E.2d 250 (1993) (internal citations omitted).

interview stopped and Hall was advised of his *Miranda* rights. (Tr. p. 67, line 2-4.) Law enforcement knew that Hall was suspect based upon the anonymous tip. (Tr. p. 68, line 4-11.) They transported Hall to the police department and allowed him to continue discussing his whereabouts until he implicated himself by stating he was near the location of the incident. (Tr. p. 66, lines 23 – p. 68, line 12.) This interrogation violated both *Miranda* and *Seibert* and the trial court should have suppressed Hall's statement. This Court should therefore reverse the trial court and grant Appellant a new trial.

III. THE TRIAL COURT ERRED IN DENYING COUNSEL FOR APPELLANT THE OPPTORUNITY TO ARGUE LAST IN VIOLATION OF THE APPELLANT'S EQUAL PROTECTION RIGHTS.

The United States and State of South Carolina constitutions both guarantee a defendant the right to present a complete defense. Specifically, "the Sixth Amendment rights to notice, confrontation, and compulsory process guarantee that a criminal charge may be answered through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence." *State v. Lyles*, 379 S.C. 328, 341, 665 S.E.2d 201, 208 (Ct. App. 2008). Furthermore, the Due Process Clause of the Fourteenth Amendment provides that these rights are extended to criminal defendants in state courts. *Id.* at 341 (internal citations omitted).

Counsel for Appellant requested that the trial court allow the State to present its case in full in its closing argument and then afford the Appellant an opportunity to reply. (Tr. p. 442, lines 9-10). Counsel for Appellant contended that the State violated Appellant's equal protection rights because in general, defendants who do not present evidence during trial and do not call witnesses are allowed to have the last argument before a jury. (Tr. p. 442, lines 15-17). However, in a case where a defendant does

present evidence, the effect essentially creates a punishment for exercising the defendant's right to present a defense. *See e.g., McCleskey v. Kemp*, 481 U.S. 279 (1986). The trial court noted counsel for the appellant's objection for the record and allowed the State to proceed with final close. (Tr. p. 442, lines 13-16.) Hall submits the trial court erred in allowing the State final closing argument thus violating his equal protection rights under the Sixth and Fourteenth Amendments.

CONCLUSION

For the foregoing reasons, Appellant respectfully submits that this Court grant a new trial.

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December 2, 2013

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DESIGNATION OF MATTER

Appellant Denorris Hall proposes that the following be included in the Record on Appeal:

1. Indictment of Denorris Evans for Attempted Armed Robbery on December 7, 2010;

2. Indictment of Denorris Evans for Attempted Murder on December 7, 2010;

3. Transcript of Trial held October 15-17, 2012 before the Honorable Kristi Harrington in the Court of General Sessions for Charleston County, State of South Carolina (Case Nos. 10-GS-10-8190 and 10-GS-10-8191) pp. 66 – 68; 110; 119; 124; 127 – 129; 162; 164; and 442;

4. State's Exhibits;

5. Verdict form;

6. Sentence sheets;

7. Notice of Appeal filed October 22, 2012.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and also upon Mr. Denorris Hall, #352879 Lee Correctional Institution 990 Wisacky Hwy. Bishopville, SC 29010, this 2nd day of December, 2013.

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SUBSCRIBED AND SWORN TO before me
this 2nd day of December, 2013.

Palma Kay (L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.