STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County
R. Lawton McIntosh, Circuit Court Judge
Case Number: 2013-001209

THE STATE,

Respondent,

vs.

JOHN DWAYNE GARVIN,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

I.

The trial court did not err in finding that video evidence, eye witness testimony, and Appellant's confession established substantial circumstantial evidence sufficient for a reasonable juror to find Appellant guilty of Trafficking in Heroin, 14 to 28 Grams, and the issue is not preserved for review.

II.

The trial court did not err in finding Appellant's confession was voluntarily given.

STATEMENT OF THE CASE

Appellant Garvin was indicted for trafficking in heroin, 14 to 28 grams. R.* Indictment. On May 21st through May 23rd of 2013, Garvin was tried before a jury. The jury found Garvin guilty of trafficking in heroin, 14 to 28 grams. The Honorable R. Lawton McIntosh sentenced Garvin to a mandatory twenty-five years in prison and a fine of $200,000.00.

STATEMENT OF FACTS

On July 16, 2012, Appellant John Dwayne Garvin (aka "Big Unc") contributed $200.00 and transportation to Jonathan Perez for the purpose of purchasing heroin with the intent of "sell[ing] it for $280.00 per 'brick.'" Ex. 1. The day after driving Perez to buy the drugs, Garvin again drove Perez to a gas station located on Highway 9, across from I-85 in Spartanburg County. Tr. p. 217, lines 1–2; p. 232, lines 23–25. At the gas station, Garvin went into the store; came out and spoke to the buyer, Fred Jerman ("Informant Buyer"), briefly, responding with "all right" when Informant Buyer told him he wouldn't be as nervous if he "fucked with him more often"; and then began to pump gas. Tr. p. 114, lines

9–21; p.199, lines 10–25; p. 200, lines 1–10. Meanwhile, Informant Buyer handed Perez money, Perez counted it, and Perez handed Informant Buyer the 14.53 grams of heroin that Perez and Garvin purchased and boosted with powdered sugar the day before. Tr. pp. 112–15.

Observing the entire transaction between Informant Buyer, Perez, and Garvin was Spartanburg County Sheriff's Department Investigator Ken Hancock. He was across the street from the incident site. Tr. p. 98, lines 12–13. Additionally, Deputy William Tillinghess and Deputy Roger Luther video recorded the drug purchase. Tr. p. 155, lines 3–22; p. 159, lines 13–25. Furthermore, Informant Buyer was a police informant who had been given $4,200.00 by law enforcement to purchase the heroin. Tr. p. 104, lines 1–10. Informant Buyer was equipped with video to record the drug purchase with sound and vision. Tr. p. 93, lines 7–23. Informant Buyer was paid $300.00 to make the controlled heroin buy. Tr. p. 104, lines 4–5; p. 134, lines 7–17; and p. 167, lines 7–11. Law enforcement had not made any assurances to Informant Buyer about his pending distribution of heroin charge, but law enforcement had dismissed or reduced charges for Informant Buyer in the past in exchange for his cooperation. Tr. p. 104 , lines 23–25; p. 105, lines 2–4; p. 135, lines 1–12.

After Garvin was arrested, Alcohol, Tobacco, and Firearm (ATF) Special Agent David Pait read Garvin his Miranda rights. Tr. p. 48, line 25 – p. 49, line 23; p. 55, lines 19–23. After notifying Garvin of his rights, Agent Pait and South Carolina Law Enforcement (SLED) Special Agent Ashley Asbill interviewed Garvin. Garvin gave a statement, which Agent Asbill wrote for him, in front of both Agents Pait and Asbill. Tr. p. 58, lines 2–6. Garvin signed that statement. Tr. p. 58, lines 14–18. Neither the interview nor the statement

were video or audio recorded. Garvin was not coerced or promised anything to give or sign his statement, he was not under duress or under the influence of drugs and/or alcohol when he gave or signed his statement, and Garvin never asked for an attorney. Tr. p. 48, line12 – p. 50, line 23; p. 52, lines 11–13; and p. 56, lines 5–20.

As part of the defense's pre-trial Jackson v. Denno motion and in trial, Agents Asbill and Pait testified that Agent Pait advised Garvin of his Miranda rights; that Garvin voluntarily waived his rights, including his right to an attorney and his right to remain silent; that Garvin gave a statement that Agent Asbill transcribed for him; that Garvin read that statement and signed it; and that Exhibit 1 reflects the statement Garvin gave them. Tr. p. 45–49. At the conclusion of the State's proffer of testimony by Agents Asbill and Pait in the Jackson v. Denno hearing, Garvin elected not to testify and Garvin's attorney made "the standard motion in terms of voluntariness and so forth. Just the regular Jackson v. Denno objection . . . ." Tr. p. 63, lines 11–13. The court, citing the totality of the circumstances, to include the short amount of time between arrest and Garvin's statement, the Miranda warnings given to Garvin, the absence of promises of leniency or coercion, the lack of a "physical condition that would make you feel like that wasn't a voluntary statement," and Garvin's ability to read and write, found that Garvin had made a free and voluntary statement to law enforcement. Tr. p. 63, line 18 – Tr. p. 64, line 10. When Garvin made his directed verdict motions after the State's case and after he closed his case, he offered no grounds and merely stated he was moving for directed verdict each time and renewing his objection during the Jackson v. Denno hearing. Tr. p. 188, lines 13–23; p. 243, line 25 – p. 244, lines 1–2.

At trial, testimony was given by law enforcement that Garvin was seen pulling into

the gas station, going inside, walking over to the buyer very briefly, and pumping gas while Perez made the drug exchange. Testimony was also provided as to Garvin's statement and the voluntariness of it, and the statement was admitted as State's Exhibit 1. Tr. p. 177, line 1 – p. 180, line 17. Garvin's counsel made the "same objections [as] before." Tr. p. 180, lines 13–15.

Garvin and Perez both testified in his defense, claiming Garvin knew nothing about the drug transaction. Additionally, Garvin testified that the written statement did not reflect what he had told law enforcement, tr. p. 202, line 18 – p. 203, line 11, and despite being able to read and write, tr. p. 198, lines 21–22, he had signed the document thinking it stated that he knew nothing about the transaction. Garvin also testified that he had never spoken to Informant Buyer before that day but was then forced to retract that statement and admit that he had spoken to Informant Buyer face-to-face about ten days prior. Tr. p. 207, lines 11–24; p. 208, line 13 – p. 211, line 3; p. 211, line 15 – p. 213, line 14. Garvin also testified that despite having a Georgia license plate, he lived in North Carolina. Tr. p. 216, lines 1–21. Garvin testified that he had given Perez a ride to South Carolina that day as a favor and had just received directions from the Buyer Informant over the phone. Tr. p. 217, lines 1–25. Finally, Garvin testified that he barely knew Perez. Tr. p. 216, lines 22–25. After Garvin testified, Perez took the stand. Perez testified that Garvin was not involved with the drug sale and did not know what Perez was doing. Tr. p. 231, lines 16–24. On cross, Perez testified that he had already pleaded guilty to the drug sale charge and was serving his sentence. Tr. p. 234, lines 19–25. After initially refusing to answer questions about where he got the drugs, Perez testified that he got the drugs from North Carolina and that he mixed the drugs with sugar. Tr. p. 235, lines 4–14. Perez testified that he had known "Big

Unc," Garvin, for a couple of years, tr. p. 238, lines 18–23, that he was like family to him, tr. p. 231, lines 7–8, and that he had told Garvin he needed a ride to the outlet in Gaffney, South Carolina, tr. p. 239, lines 11–14. Perez testified that Garvin lived in Georgia. Tr. p. 240, lines 23–25. After confirming that Perez had never given an oral or written statement to police about that drug deal and the events surrounding it, Perez testified that the first time he was telling anyone about mixing the drugs with powdered sugar was that day on the stand. Tr. p. 241, lines 16–25.

Garvin's attorney moved for directed verdict after the State's case in chief and after the Defense rested its case, and he also challenged the voluntariness of Appellant's statement.

ARGUMENT

I.

The trial court did not err in finding that video evidence, eye witness testimony, and Appellant's confession established substantial circumstantial evidence sufficient for a reasonable juror to find Appellant guilty of Trafficking in Heroin, 14 to 28 Grams, and the issue is not preserved for review.

Appellant Garvin argues the trial court should have granted directed verdict based on his testimony that Agents Pait and Asbill tricked him into signing his written confession. His written confession is part of the evidence presented by the State to prove Appellant's guilt. It is for the jury to decide which version of events was more credible, not the trial court; therefore, the trial court did not err in denying the motion for directed verdict.

Furthermore, Garvin failed to preserve this issue for review. While a motion for directed verdict was made after the State's case and at the close of Appellant's case, the objection was too general and did not state any grounds to support the motion.

More than a general directed verdict motion is required to preserve a directed verdict ruling. In re McCracken, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001); see State v. Bailey, 298 S.C. 1, 5–6, 377 S.E.2d 581, 584 (1989) (holding that the defendant, who did not make a directed verdict motion, but only "standard motions," could not argue directed verdict issues on appeal). Merely moving for a directed verdict without stating any grounds is insufficient to preserve a directed verdict issue for review. State v. Kennerly, 331 S.C. 442, 503 S.E.2d 214 (Ct. App. 1998). And issues not raised to the trial court in support of the directed verdict motion are not preserved for appellate review. Id., 331 S.C. at 454,

503 S.E.2d at 221.

At the close of the State's case, Garvin objected as follows: "at this time we'd make a motion for a directed verdict of acquittal." Tr. p. 188, lines 14–15. The Court asked if he was incorporating the objections he had at the time of the Jackson v. Denno hearing, and Garvin responded he was. Tr. p. 188, lines 16–18. No grounds were stated to support the motion and this specific issue was not raised. Even referring back to Garvin's objections at the time of the Jackson v. Denno hearing, there are no grounds or support offered for the motion. Garvin's objection during the Jackson v. Denno hearing was "just the standard motion in terms of voluntariness and so forth. Just the regular Jackson v. Denno objection at this point." Tr. p. 63, lines 11–13.

Because Garvin made only a general directed verdict motion with no supporting grounds and because he did not raise this issue in support of that general motion, this issue is not preserved and should not be reviewed by this Court.

Furthermore, there was substantial circumstantial evidence to send this case to the jury. According to Appellant Garvin's own statement and testimony, using his vehicle, he drove Perez to buy the heroin they planned to sell; assisted in adding powdered sugar to the heroin to boost the weight; communicated with the Informant Buyer as to the location of the drug transaction at issue; using his vehicle, drove Perez to that location; communicated with the Informant Buyer after the drug transaction was complete; and, after the drug transaction, drove Perez and the cash away from location. Testimony from Perez, officers on scene observing the transactions, agents interviewing Garvin, and the Informant Buyer corroborated several of Garvin's admissions. As held by the trial court: "there [was] enough sufficient evidence in the record . . . to be a question for the jury to make a

determination." Tr. p. 188, lines 21–23.

When considering a motion for directed verdict, the trial court is concerned with the existence of evidence, not its weight. State v. Walker, 349 S.C. 49, 53, 562 S.E.2d 313, 315 (2002). In reviewing the denial of a motion for a directed verdict, the reviewing court must view the evidence in the light most favorable to the State. Id. "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find that the case was properly submitted to the jury." State v. McGowan, 347 S.C. 618, 622, 557 S.E.2d 657, 659 (2001) (citing State v. Rowell, 326 S.C. 313, 315, 487 S.E.2d 185, 186 (1997)).

Ultimately, the question is whether, in view of the evidence in the light most favorable to the State, a rational trier of fact could find all the elements beyond a reasonable doubt. State v. Robinson, 310 S.C. 535, 426 S.E.2d 317 (1992) (finding any rational trier of fact could have found all the elements of the crime beyond a reasonable doubt in affirming the denial of a motion for directed verdict).

Our Supreme Court recently articulated the following concerning the standard of review:

> The trial court should 'grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty, as suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof.' On the other hand, 'a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis.'

State v. Hepburn, 406 S.C. 416, 753 S.E.2d 402, 409 (2013) (quoting State v. Cherry, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004) (citations and internal quotations omitted)).

And it is up to the jury, not the trial court, to decide which of the dueling versions of

events were truthful. "[T]he jury is the judge of which contradictory statement of the witness is the truth." State v. Needs, 333 S.C. 134, 144, 508 S.E.2d 857, 862 (1998) (citation and internal quotation marks omitted); see State v. Buckmon, 347 S.C. 316, 323 n.6, 555 S.E.2d 402, 405 n.6 (2001) (credibility of a witness goes to the weight of the evidence and not consideration by the trial court in determining whether to grant a directed verdict); cf. State v. Crawford, 362 S.C. 627, 634, 608 S.E.2d 886, 890 (Ct. App. 2005) (finding the contradiction between accomplice's statement to police and subsequent trial testimony disavowing knowledge of Crawford's involvement was a matter of weight for the jury to resolve).

In the instant case, the jury was free to decide whose testimony was the truth. Given several inconsistencies between Garvin's testimony and defense witness Perez's testimony; the inconsistencies within Garvin's own testimony; the corroborated testimony of the two agents; and the testimony from defense witness Perez that he had told no one of the specific facts found in Garvin's written statement and therefore agents would not have known those facts at the time Garvin's statement was memorialized, the jury's verdict is supported by evidence in the record and the trial court did not err in denying the motion for directed verdict. See Town of Hartsville v. Munger, 93 S.C. 527, 527, 77 S.E. 219, 219 (1913) ("False and conflicting statements . . . have always been regarded as some evidence of guilty knowledge and intent.").

The State presented the following substantial circumstantial evidence, which reasonably tended to prove that Garvin sold the drugs and was thus sufficient for the trial court to submit the case to the jury:

(1) Garvin's confession that he contributed $200.00 towards buying the drugs that

were later sold;

(2) Garvin's confession that he provided transportation to pick up the drugs that were later sold;

(3) Garvin's confession that he helped purchase these drugs for the purpose of selling the drugs;

(4) Garvin's testimony that he called and spoke with the Informant Buyer to get directions to the Informant Buyer's location, which was corroborated by Partner's testimony and the Informant Buyer's testimony;

(5) Garvin's conflicting testimony where he claimed not to have ever met the Informant Buyer before that drug transaction and then later admitted that he had in fact spoken face-to-face with that Informant Buyer ten days prior to that drug transaction;

(6) Garvin's testimony that he was present at the scene of the drug sale, which was corroborated by Investigator Hancock and Deputies Tillinghess and Luther's testimony, the Informant Buyer's testimony, video evidence, and Perez's testimony;

(7) Perez's testimony, which conflicted with Garvin's testimony as to where Garvin lived at the time of the drug transaction, what reason Garvin had been given to drive to meet the Informant Buyer, who had knowledge of the heroin having sugar added to it, and how well Garvin knew Perez;

(8) Garvin's brief conversation with the Informant Buyer after the drug transaction, in which the Informant Buyer said to Garvin "fuck with me a couple more times and you don't have to be this nervous," to which Garvin replied "all right"; and

(9) Garvin's testimony that he drove Partner and the money away from the scene of the transaction, which was corroborated by Investigator Hancock and Deputies Tillinghess and Luther's testimony and video.

Additionally, Garvin's reliance on State v. Odems, 395 S.C. 582, 588, 720 S.E.2d 48, 51 (2011) is misplaced. In Odems, no evidence was presented that Odems was even at the scene of the burglary—instead he was found by law enforcement in a car with stolen goods and two burglars, and he fled. The burglars testified they picked Odems up at a gas station **after** the burglary. The burglars' prints were found on stolen items, but no fingerprints matching Odems were found. Id. Unlike Odems, Garvin admitted he was at the scene, testimony by several witnesses put him there, and video evidence placed him at the scene; Garvin confessed to his part in the drug transaction and portions of his confession were corroborated by testimony from Perez and law enforcement. Evidence in this case is considerably stronger than the evidence presented in Odems.

II.

The trial court did not err in finding Appellant's confession was voluntarily given.

Appellant Garvin argues that the State did not prove by a preponderance of the evidence that his statement was freely, voluntarily, and knowingly given. Garvin, in fact, claims he was tricked into signing his statement. However, testimony by Agents Pait and Asbill provide more than enough evidence that Garvin's statement was given freely, voluntarily, and knowingly.[1]

1 Additionally, it is questionable whether Garvin preserved this issue for appeal. His objection during the Jackson v. Denno hearing was general. When Garvin renewed his objection after trial testimony, when the

> Our role when reviewing a trial court's ruling concerning the admissibility of a statement upon proof of its voluntariness is not to reevaluate the facts based on our view of the preponderance of the evidence. Rather, our standard of review is limited to determining whether the trial court's ruling is supported by any evidence. Thus, on appeal the trial court's findings as to the voluntariness of a statement will not be reversed unless they are so erroneous as to show an abuse of discretion.

State v. Breeze, 379 S.C. 538, 543, 665 S.E.2d 247, 250 (Ct. App. 2008) (citing State v. Miller, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct. App. 2007)). See also State v. Rochester, 301 S.C. 196, 200, 391 S.E.2d 244, 247 (1990) (holding a trial court 's determination of voluntariness of a statement will not be reversed absent an abuse of discretion amounting to error of law (citing State v. Livingston, 223 S.C. 1, 73 S.E.2d 850 (1952)).

The burden is on the State to show that a confession is admissible. The trial court should examine the totality of circumstances to determine admissibility. The State must prove the statement was voluntary and in compliance with Miranda. State v. Middleton, 288 S.C. 21, 339 S.E.2d 692 (1986). "In order to determine whether a statement is voluntary, the trial court must inquire whether under the totality of the circumstances the suspect's will was overborne." State v. Carmack, 388 S.C. 190, 199, 694 S.E.2d 224, 228 (Ct. App. 2010) (citing Miller, 375 S.C. at 384, 652 S.E.2d at 451). "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, and

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written statement was offered for admission, he merely stated that he was making the same objection as before.

promises of leniency." State v. Dye, 384 S.C. 42, 47, 681 S.E.2d 23, 26 (Ct. App. 2009) (citations omitted).

In both the pretrial Jackson v. Denno hearing and in trial, Agents Pait and Asbill testified that while Garvin was nervous, he was not unusually nervous as compared to other people in police custody, tr. p. 177, line 24 – p. 178, line 4; that he was fully advised of his Miranda warnings by Agent Pait; that he never asked for an attorney; that he never asked to exercise his right to remain silent; that he was questioned in a room with only Agents Pait and Asbill; that he gave his statement less than an hour after being taken into custody; that he appeared to be able to read and write, tr. p. 178, lines 16–17; that he was 42 years old; that he did not appear to be sick or under the influence of any drugs, tr. p. 48, lines 12–24; p. 170, line 22 – p. 171, line 10; p. 178, lines 5–10; and that there were no misrepresentations, threats of violence, or promises of leniency made by law enforcement to Garvin.

In the instant case, the factual findings are supported by evidence and the trial court correctly determined that the statement should be admitted. Accordingly, the conviction and sentence should be affirmed.

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

April 21, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County
R. Lawton McIntosh, Circuit Court Judge
Case Number: 2013-001209

THE STATE,

Respondent,

vs.

JOHN DWAYNE GARVIN,

Appellant.

DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

In addition to the matter designated by Appellant, Respondent proposes the following to be included in the Record on Appeal:

> Trial Transcript pages: cover page; pp. 52, 115, 118, 123, 125–6, 129, 134–35, 185, 208–12, 216–17, 232, 235, and 238–41.

To facilitate the preparation of the Final Brief, Respondent requests that counsel for Appellant retain the page numbers of the trial transcript in the Record on Appeal, in addition to the new page numbers.

The undersigned hereby certifies this Designation contains no matter which is irrelevant to this appeal.

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April 21, 2014

STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM SPARTANBURG COUNTY
R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2013-001209

THE STATE, ...RESPONDENT

v.

JOHN DWAYNE GARVIN, ...APPELLANT.

PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Initial Brief of Respondent* and *Designation of Matter*, both dated April 21, 2014 on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Lanelle C. DuRant, Appellate Defender
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I further certified that all parties required by Rule to be served have been served. This 21st, day of April 2014.

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April 21, 2014

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Re: The State v. John Dwayne Garvin
Appellate Case No. 2013-001209

Dear Counsel:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Johanna C. Valenzuela
Assistant Attorney General
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JCV/ab
Enclosures

cc: Honorable Jenny A. Kitchings
(original enclosed)
Victim Services