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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Diane Schafer Goodstein, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GERALD BERNARD HALTIWANGER

APPELLANT

Appellate Case No. 2013-002460

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Was it unduly prejudicial under Rule 403, SCRE, for the trial court to admit in evidence the partial recording of the custodial interrogation of Appellant where the recording was recorded exclusively by the police and contained only those parts of Appellant's statement the police viewed as pertinent to their case and omitted portions that more fully explained Appellant's entire statement?

STATEMENT OF THE CASE

Gerald Bernard Haltiwanger, Jr. was indicted for Murder by Richland County grand jury on October 10, 2012. The indictment alleged that Mr. Haltiwanger did in Richland County, on or about August 25, 2012, willfully, feloniously, and intentionally kill the victim, Jimmy Moti, with malice aforethought, either express or implied, by means of gunshot wound, and the victim did die as a proximate result thereof, in violation of S.C. Code § 16-03-0010.

A trial was held November 12-15 and 18, 2013 before the Honorable Diane Schafer Goodstein and a jury. Assistant Public Defenders Mark Sawyer, Alicia Dyar, and Pat Sharpe represented appellant. Assistant Solicitors Luck Campbell, Megan Walker, and Sandra Vriesinga represented the state.

Pre-trial hearings pursuant to Jackson v. Denno and Neil v. Biggers were held. Tr. 85, ll. 6-9. At issue in the Jackson v. Denno hearing was whether a statement typed by the police and purported to be Appellant's statement was voluntarily made. After the hearing, Appellant conceded that the statement was voluntary but argued to suppress the statement based on fact that the statement was a partial recording of a custodial interrogation between himself and the police and that it was misleading to the jury to admit only the partial recording. Tr. 194, ll. 5-14.

The trial court admitted the statement in evidence, stating that Appellant's argument went to "weight rather than admissibility." Tr. 194, ll. 15-21. The state moved the statement into evidence and published it to the jury over Appellant's objection. Tr. 609, ll. 3-15; 610-613. On November 18, 2013, the jury found Appellant guilty of Murder. Tr. 965, ll. 21-24;

966, lines 1-2. Judge Goodstein sentenced Appellant to a life term in prison. Tr. 988, ll.12-17. This appeal follows.

STATEMENT OF FACTS

Officers from the Richland County Sheriff's Office arrested Appellant on August 29, 2012 and transported him to the police department headquarters. Sergeant Lindler verbally advised Appellant of his rights. Tr. 95, ll. 24, 25; Tr. 96, ll. 1-13; Tr. 122, 1-6. Once Appellant was put into a room at police headquarters, Sgt. Lindler and Officer Jordan gave Appellant a written Advice of Rights form, which they read to Appellant and had him sign. Tr. 98-101, 122-123. Appellant signed the Advice of Rights form at 1755 hours. Tr. 102, ll.18-20. Sgt. Lindler began typing Appellant's statement at 1900 hours. Tr.103, ll. 4-6. Sgt. Lindler then read the statement to Appellant and gave Appellant a copy of it. Tr. 104, 18-19.

A second interview took place on August 31, 2012. Once again, Sgt. Lindler advised Appellant of his rights by reading him the Advice of Rights form and Appellant signed the form. Tr. 107-108, Tr. 126, ll. 21-23. Appellant was not allowed to sit at the computer to review and make changes to his statement. Tr. 112, ll. 16-19. Appellant was not allowed to write his own statement in his own handwriting or type his statement. Tr.112, ll. 20-21. The police did not audio or video record the statements or interrogation. Tr. 112-113, ll. 22-25, 1-6; Tr. 128, ll. 9-12. The police typed the statement with information that they viewed as "pertinent to the case." Tr. 128, ll. 13-25.

The second typed statement is the focus of this appeal. The trial court admitted the statement in evidence, stating that it being a partial recording went to the "weight rather than admissibility." Tr. 194, ll. 15-21. The state moved the statement into evidence and published it to the jury over Appellant's objection. Tr. 609, ll. 3-15; 610-613; exhibit S-4.

Appellant continued to challenge the completeness of the statement at trial. On cross-examination, Officer Jordan conceded that not everything that was discussed in the interview

with the Appellant was recorded in the typewritten statement. Tr. 407, ll. 1-4. However, Officer Jordan maintained that what was left out of the statement was not in the officers' opinion "pertinent" to the case. Tr.407, ll. 6-10.

Appellant testified at trial as to the missing parts of the typed statement. Specifically, Appellant testified that he told the police during the second conversation, on August 31, 2012, about the victim pulling the gun out before he maced Appellant Tr. 778, lines 8-16. He also told the police about the women in the truck and that the victim "never put his gun away and that he was charging off the porch-way of the club pointing his gun at my car." Tr. 778. He testified that those parts were missing from the typed statement that the State introduced into evidence. Tr. 778. Furthermore, Appellant testified that the last question the police asked him was not "Is there anything else you need to tell us?" but "This is your moment to tell the family, you know, basically give the family closure, so what do you have to tell the family?" Tr. 779. At that point, Appellant stated that he was sorry. Tr. 779, ll. 15-22.

On cross, the state accused Appellant of telling his story for the first time that day, meaning that he had not told the police the version he just testified to. Tr. 781, ll. 7-11. At one point, the prosecutor asked, "So you didn't do anything to provoke [victim], for him to then pull – which is the first time we've heard this – your – the gun out." Tr. 801, ll. 1-4. Later in the cross examination, the prosecutor asked, "And according to your testimony here today in November 2013 he pulled his gun." Tr. 803, ll. 9-10. Appellant testified, "I told the jury the same thing I said when I was talking to the Ser – investigators. I told them the same thing today." Tr. 832, ll. 11-13.

The trial judge instructed the jury on murder, voluntary manslaughter, and self-defense. Tr. 951-956. The jury returned a verdict of guilty on the charge of murder. Tr. 965, ll. 21-24. Judge Goodstein sentenced Appellant to life. Tr.988, ll. 12-17.

LEGAL ARGUMENT

I. The trial court erred in admitting the partial recording of the police interrogation of Appellant by failing to properly conduct a Rule 403 analysis.

The trial court erred by admitting in evidence a partial recording of Appellant's statement to the police because, despite Appellant's request to do so, the trial court failed to properly conduct a Rule 403 analysis. The failure to conduct this requested analysis was an error of law warranting reversal of Appellant's conviction and a remand for new trial.

The trial court properly held a Jackson v. Denno hearing to determine the admissibility of Appellant's statement regarding whether it was given to the police after knowingly and voluntarily waiving his *Miranda* rights. Tr. 90-195. However, when asked by Appellant to conduct further analysis of the admissibility of the partial statement under the Rules of Evidence, the trial court erred by ruling that Appellant's objections went to the "weight rather than to the admissibility" of the partial statement. Tr. 194, ll. 15-21. This was not a "compressed" analysis by the trial court, as was found in State v. King, 349 S.C. 142, 157, 561 S.E.2d 640, 647 (Ct. App. 2002). Instead this was a total failure of the trial court to consider or conduct any Rule 403 analysis as requested by Appellant, Tr. 194, ll. 15-21, 24-25; 195, ll. 1-7, and warranted by the facts and relevant law.

Our Supreme Court held in State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991), that "[i]t is now the overwhelming majority rule that relevant evidence may be excluded for undue prejudice even though no specific exclusionary rule requires exclusion" pursuant to Rule 403, SCRE. Id. at 382. Consequently, a Rule 403 analysis should be conducted—especially when requested by the adverse party—on evidence that is relevant and otherwise admissible. The trial court's failure to conduct a Rule 403 analysis was an error of law.

Moreover, as is discussed further below, this error was not harmless because it reasonably affected the result of the trial.

An analysis under Rule 403, SCRE, requires a trial judge to balance the probative value and prejudicial effect of the proffered evidence. State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586 (S.C. App. 2010). The trial court should have balanced the probative value of the typed statement, which contained Appellant's admission to shooting the victim, with the prejudicial effect of misleading the jury into believing that the typed statement was a complete statement of the conversation Appellant had had with the police.

There was ample evidence in this case that Appellant was the shooter. In fact, Appellant admitted in his opening statement to the jury that he shot the victim. Tr. 221, l. 25-222, l. 1. Appellant had an explanation for shooting the victim but that was not included in the statement the police typed-up, despite the fact that Appellant contended at trial that he told this to the police. Tr. 778, ll. 8-25, 1. The police admitted under cross examination that they did not record the entire conversation. Tr. 407, ll. 1-10; 15-24. They admitted to recording only what, in their view, was "pertinent" to their case. Tr. 407, ll. 6-10; 128, ll. 13-25.

Because the police recorded only what they viewed was pertinent and relevant to their case, the typed statement did not contain the remaining statements explaining or qualifying Appellant's statements as to why he shot the victim. At trial, Appellant testified to the parts of the conversation that were not recorded in the typed statement. Appellant testified that the victim "pulled his firearm. As soon as he pulled it, he cocked it back; he put a bullet in the chamber." Tr. 755, ll. 21-22. Appellant further testified that as he walked away, with his hands in the air, the victim followed him with the gun to Appellant's back. Tr. 756, ll. 23-24. Then the victim grabbed a can of mace with his left hand and maced Appellant from behind.

Tr. 758, ll. 10-17. At that point, Appellant's brother walked up and hit the victim, causing the victim's gun to fall out of his hand. Tr. 760, ll. 3-4. The victim then picked up the gun and started threatening Appellant and his brother. Tr. 760, ll. 6-8; 762, ll. 13-17. Appellant and his brother got into their cars and started to pull out of the driveway when Appellant noticed that the victim was jumping off the porch with his gun pointed at the car. Tr. 771-772. Appellant grabbed his gun from between the bucket seats and began shooting. Tr. 772, ll. 14-24. Appellant testified that he pulled his gun out and shot out the window because he feared for his own safety. Tr. 73, ll. 2-5.

Appellant's claim that he feared for his safety because the victim had his gun drawn is evidence that would have changed the course of the trial had it been in the typed statement. Appellant testified, "I was scared; I was terrified. I thought he was going to shoot, you know, my car, at my car and hit me and my brother, either or, one or the other." Tr.773, ll. 3-5. Appellant's version of events as testified at trial, coupled with testimony of the State's witness, Lamar Ray, would have changed the outcome of the trial. Ray, who was working at El Toro restaurant with the victim the night of the shooting, also testified that the victim had his gun out. Tr. 324, l. 19. Ray did not testify that the victim holstered his gun. Tr. 324-325. This information supported Appellant's voluntary manslaughter and self-defense claims. The typed statement in evidence was presented by the State as the entire statement of relevant information about the shooting that Appellant made to the police. Tr. 407, ll. 1-22; 700, ll. 21-23; 701 ll. 22-25. When Appellant challenged the fact that portions of the statement were missing, the state accused Appellant of telling a new version of the story for the first time at trial. Tr. 781, ll. 7-11. At one point, the prosecutor asked Appellant, "So you didn't do anything to provoke [victim], for him to then pull – which is the first time we've heard this – your – the gun out." Tr. 801, ll. 1-4. Later in the questioning, the

prosecutor says, "And according to your testimony here today in November 2013 he [victim] pulled his gun." Tr. 803, ll. 9-10. Appellant testified, "I told the jury the same thing I said when I was talking to the Ser – investigators. I told them the same thing today." Tr. 832, ll. 11-13. The fact that Appellant's testimony included parts that were not in the typed statement could have been viewed by the jury as inconsistent, and therefore, not credible. The credibility of Appellant was directly impacted by the missing parts of the typed statement.

The State played upon this inconsistency, arguing in closing that the appellant made up a new version of the story. Tr. 933, ll. 11-22. The state's closing highlights the unfair prejudice of allowing the typed statement into evidence and of inaccurately presenting it as a complete record of the conversation between the police and Appellant. There should not be a dispute as to what Appellant told the police because the entire conversation could have and should have been recorded, either electronically or in writing. The state should not get to benefit from strategically failing to preserve evidence. The police should not get to decide what evidence to record and then argue that the missing parts were not "pertinent" to their case without detailing what parts are missing. Allowing the state and the police to strategically fail to preserve evidence creates confusion for the jury and misrepresents to the jury the circumstances surrounding the statement.

The police intentionally deprived Appellant of the opportunity to provide the jury with two consistent statements (i.e., a written statement and in-court testimony) by not preserving the conversation with Appellant in its entirety. If the entire conversation between the police and Appellant had been recorded, the case would still have come down to a test of the credibility of the witnesses, as it did in the trial. However, Appellant would have been able to present evidence of his consistent account of what happened beginning with what he

told the police during his interrogation in August 2012 and what he told the jury in November 2013. Moreover, the state would have been prevented from attempting to confuse the jury and mislead it into believing that the nearly three hours of conversation that was not recorded was somehow irrelevant to the case. Additionally, a proper recording would have created no unfair position for either party; since it would have reflected the entirety of what was said. Instead, the state intentionally—and with the purpose of gaining the strategic advantage of presenting the evidence in a way that support its conclusion—failed to record the entire, or even most of, the statement. Given the nearly three hours of conversation that was missing, there is a reasonable probability that the jury's verdict was influenced by the admission of the partial statement. The admission of the partial statement misled the jury and unfairly prejudiced Appellant's case.

CONCLUSION

For the above stated reasons, this Court should reverse and remand for a new trial.

Respectfully submitted,

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This 5th day of December, 2014.