STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Charleston County
The Honorable R. Markley Dennis, Circuit Court Judge
Appellate Case No. 2013-002659

THE STATE,

Respondent,

v.

KEENAN COAKLEY,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The circuit court did not abuse its discretion in allowing the co-defendant to testify about Appellant's statements inside the car when the police initiated a traffic stop.

STATEMENT OF THE CASE

The Charleston County Grand Jury indicted Appellant Keenan Coakley in April 2011 on one count of armed robbery. The Honorable R. Markley Dennis, Circuit Court Judge, presided over a jury trial commencing December 3, 2013. The jury convicted Appellant as charged, and the circuit court sentenced him to sixteen years incarceration. This appeal followed.

STATEMENT OF THE FACTS

In April 2011, the Charleston County Grand Jury indicted Appellant Keenan Coakley on one count of armed robbery arising from the robbery of a cell phone store on September 15, 2010. The case was called for a jury trial on December 2, 2013, before the Honorable R. Markley Dennis, Circuit Court Judge.

Evidence at trial established two men, wearing cloths over their faces and ball caps, entered a cell phone store on September 15, 2010, and stole the cashbox containing approximately $1000. At least one of the men had a gun. The men entered and exited through a back door, and the store owner saw them run into a field behind the store. The owner testified there was a uniquely marked $100 bill in the cashbox. (Trial Transcript [TT], pp. 147-169; Record on Appeal [R.], pp. 15-37).

The store employees ran out of the store when the men entered, and yelled for someone to call 911 because they were being robbed. A woman in the parking lot called 911, and noticed a man "looking very nervous" standing next to a red and black car. After the employees ran out, the man got into the car and drove off. As the car backed up, the woman got the license tag number and gave it to police. (TT, pp. 226-231; R., pp. 38-43).

A man ("Davis") who lived on a dead end road (Sam Edwards Road) near the shopping mall testified he saw a red and black car drive down the road twice on the day of the robbery. The first time there were four people in the car, but when the car drove out, two of the passengers were on foot. About a half hour later, the car came back, and the two men who left on foot earlier ran out on the road. One of the men was carrying something under his coat, and Davis saw him throw it in a ditch as he ran. The men got

into the red and black car, which left very fast. When police arrived a short time later, Davis showed them where the man threw the item, subsequently identified as the cashbox from the cell phone store, in the ditch. (TT, pp. 294-308, 349-350; R., pp. 44-58, 59-60).

Officer Joseph Zeitner of the Mount Pleasant Police Department testified he heard the dispatch regarding an armed robbery, with a description and license tag number of the red and black car. He almost immediately saw the car cross an intersection in front of him, and initiated a traffic stop after he was able to verify the license tag number. There were four men in the car, and he ordered them to put their hands up. (TT, pp. 362-366; R., pp. 61-65).

After a back-up officer arrived, Zeitner started getting the occupants out of the vehicle, beginning with the driver (Kevin Smalls). While he was getting Smalls out, the two males in the back seat, subsequently identified as Appellant and co-defendant Jarrett Graddick were moving around. Graddick, who was seated behind the driver, dropped down out of Zeitner's sight three times, and Appellant, seated behind the front passenger seat, tried to get into the front seat of the car. The officers ordered Graddick out of the car, and had Appellant slide across the backseat and exit on the driver's side. They then got the front seat passenger (Brian Mazyck) out of the car. (TT, pp. 366-375; R., pp. 65-74).

A police supervisor who assisted in the traffic stop testified that after the occupants were removed from the car, officers moved it out of the roadway into a parking lot to secure it and wait on the crime scene technicians. When she looked into the car, she saw a Glock handgun on the passenger side, and money in the back seat arm rest. (TT, pp. 386-397; R., pp. 75-86).

The crime scene/evidence technician testified he recovered some shirts turned inside-out, a black pair of pants, a belt, and gloves from inside the car. He also recovered cash ($1,095) from the back seat's center console, and a forty-five caliber Glock handgun from under the back of the front passenger seat. (TT, pp. 426-445, 449-455; R., pp. 87-106, 107-113). The cash included the uniquely marked bill described by the store owner. He then responded to the location where the cashbox was found, photographed the location, and retrieved the cashbox as evidence. (TT, pp.454-459; R., pp. 112-117).

Mazyck testified for the State, and recounted the events on September 15, 2010, leading up to the traffic stop. He stated he was in the car with Smalls in the shopping mall parking lot when the store owner yelled the store had been robbed, but Smalls told him not to "get involved." Smalls then drove out of the parking lot at "a nice little speed," went to Sam Edwards Road, went to the end of Sam Edwards Road and turned around. Mazyck saw Appellant and Graddick come out of a path and wave Smalls down. They were wearing gloves and had something covering the lower part of their faces, and one of them threw the cashbox down before they got in the car. Appellant got in the backseat behind Mazyck, and Graddick got in the backseat behind Smalls. (TT, pp. 485-510; R., pp. 118-143).

Appellant objected to Mazyck testifying about statements Appellant made inside the car, arguing it was inadmissible hearsay. The circuit court overruled the objection, finding the statements were not made to law enforcement, and were not hearsay under Rule 801(d)(2), SCRE. (TT, pp. 510-515; R., pp. 143-148).

Mazyck testified Appellant and Graddick started taking off the clothes they had on when they got in the car, and putting on clothes laying on the backseat, and he saw a

gun under the backseat armrest. After Zeitner stopped the car and ordered them to get out, Appellant said: "Go! I'm not going back to jail." (TT, pp. 518-521; R., pp. 151-154).

During Mazyck's cross-examination by Graddick, the State objected to questions regarding dismissed charges, and the jury was excused. Prior to hearing the State's objection, the circuit court allowed Appellant to "supplement" his previous objection to Mazyck's testimony about Appellant's statement. Appellant argued the statement about going back to jail indicated a prior offense, and moved for a mistrial. (TT, pp. 537-538; R., pp. 155-156). At the conclusion of Mazyck's testimony, the court denied the motion, finding the reference to "jail" was vague, it did not suggest a conviction, and the State did not attempt to prove any prior by acts by Appellant. The court also found the testimony had "significant probative value," particularly regarding Smalls' involvement, and reiterated its previous finding the testimony was not inadmissible hearsay. (TT, pp. 627-632; R., pp. 157-162).

The jury convicted Appellant as indicted, and the circuit court sentenced him to sixteen years incarceration. (TT, pp. 905, 969; R., pp. 164, 166). This appeal followed.

ARGUMENT

The circuit court did not abuse its discretion in allowing the co-defendant to testify about Appellant's statements inside the car when the police initiated a traffic stop.

Appellant asserts the circuit court erred in admitting Mazyck's testimony regarding Appellant's statement about "not going back to jail" when the officer initiated the traffic stop. He argues the testimony was inadmissible prior bad act evidence, and unduly prejudicial.

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion, which occurs when the trial court's conclusions either lack evidentiary support, or are controlled by an error of law. State v. Pagan, 369 S.C. 201, 631 S.E.2d 262, 265 (2006). The appellate court reviews a trial court's decision regarding the comparative probative value and prejudicial effect of evidence under Rule 403, SCRE, for abuse of discretion, and should only reverse that decision in exceptional circumstances. State v. Collins, 409 S.C. 524, 763 S.E.2d 22, 28 (2014), reh'g denied (Sept. 24, 2014),; *see also* State v. Williams, 409 S.C. 455, 761 S.E.2d 770, 775 (Ct. App. 2014)("'If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal.'") (*quoting* State v. Lyles, 379 S.C. 328, 665 S.E.2d 201, 207 [Ct. App. 2008]). In this case, the circuit court properly exercised its discretion in admitting the statement at issue.

Prior to Mazyck repeating Appellant's statement inside the car, Appellant objected to the Mazyck's testimony regarding Appellant's statement on the ground it was inadmissible hearsay, and he could not cross-examine Graddick and Smalls about it. The circuit court properly determined it was a statement against interest made **by Appellant**

in front of a **non-law enforcement third party**, and as such, it was not hearsay pursuant to Rule 801(d)(2), SCRE, and did not implicate Bruton.[1] (TT, pp. 510-515; R., pp. 143-148).[2]

Appellant made a general objection when Mazyck testified about the statement, which the court overruled. (TT, pp. 520-521; R., pp. 153-154). When the court subsequently allowed him to "supplement" his objection to Mazyck's testimony regarding the statement, Appellant asserted the statement indicated Appellant had a prior conviction or offense, and moved for a mistrial. (TT, pp. 537-538; R., pp. 155-156). At the conclusion of Mazyck's testimony, the circuit court denied Appellant's mistrial motion, finding the statement was very vague because nothing in it suggested a conviction, or indicated why Appellant was in jail, and it was not error to allow it. The court further found that even if there was any error in admitting the testimony, the error was harmless. Finally, the court found the statement had "significant probative value," and the State never attempted to prove Appellant committed any prior bad acts. (TT, pp. 627-632; R., pp. 157-162).

As a threshold matter, the statement at issue was not a confession or admission regarding the armed robbery. While it could be construed as evidence Appellant feared he might go to jail for **some** reason, any inference to be drawn from the statement in relation to the armed robbery was a matter for the jury. As the circuit court found, Appellant's previous experience in jail could have been related to any number of issues, including a traffic violation or a family court matter. (TT, p. 627; R., pp. 157). Thus, the

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[1]Bruton v. United States, 391 U.S. 123, 126 (1968) (admission of a non-testifying co-defendant's confession that implicates a defendant violates the defendant's Confrontation Clause rights).

[2]Appellant does not challenge the hearsay ruling on appeal.

statement was no more than a vague reference, made by Appellant himself, to some prior interaction with the judicial system.

Significantly, the State did not attempt to present any evidence Appellant had ever committed, much less been convicted of, **any** criminal acts prior to the armed robbery at issue. *See* State v. Thompson, 352 S.C. 552, 575 S.E.2d 77, 82-83 (Ct. App. 2003) (vague reference to a defendant's prior criminal record is not sufficient to justify a mistrial where there is no attempt by the State to introduce evidence that the accused has been convicted of other crimes) (*overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 [1991]); *see also* State v. Robinson, 238 S.C. 140, 119 S.E.2d 671 (1961) (even if the testimony created the inference in the jury's mind that the accused had committed another crime, the State never attempted to prove the accused had been convicted of some other crime); State v. Wiley, 387 S.C. 490, 692 S.E.2d 560, 563 (Ct. App 2010) (same). It is undisputed law enforcement did not induce the very vague statement recounted by Mazyck, no one associated with the State was present when Appellant made it, and Appellant was free to, and did, challenge Mazyck's credibility.

Probative evidence may be excluded **if** the prejudicial effect outweighs the probative value. Rule 403, SCRE. "Unfair prejudice" does not mean the damage to a defendant's case resulting from the evidence's legitimate probative force, but refers to evidence which tends to suggest a decision on an improper basis. State v. McGee, 408 S.C. 278, 758 S.E.2d 730, 736 (Ct. App. 2014). Only "unfair prejudice" must be scrutinized under Rule 403. *Id.* Appellant's statement was probative not only to Appellant's state of mind, but as the circuit court found, it was highly probative regarding

Smalls' involvement in the robbery, and the minimal prejudice to Appellant did not outweigh the probative value.

Appellant's assertion the jury could have relied on the statement alone to convict him is pure speculation, but more importantly, it completely ignores the more compelling evidence on which the jury could rely. The testimony established the robbers left the store and went into a field behind it. A witness testified he saw two men come out of that field, throw down the cashbox, and get into a car identified as one seen outside the store during the robbery. Very soon thereafter, Appellant was found in the backseat of that car, along with a gun and cash taken from the store. It is far more likely the jury convicted Appellant based on that evidence rather than his vague statement about "going back to jail."

The record amply supports the circuit court's finding Appellant's statement inside the car was admissible and highly probative. Therefore, the circuit court did not abuse its discretion, and its ruling on this issue should be confirmed.[3]

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[3]Even if this Court finds error in admitting the statement, any error was harmless. The materiality and prejudicial character of the alleged error must be determined from its relationship to the entire case, and an error is harmless when it could not have reasonably affect the jury's verdict. Thompson, 575 S.E.2d at 83. A conviction should not be reversed when review of the entire record establishes the error was harmless beyond a reasonable doubt. *Id.* As discussed above, without considering the statement at all, there was substantial evidence from which the jury could find Appellant guilty of armed robbery.

CONCLUSION

Based on the foregoing, Respondent submits Appellant's conviction and sentence should be affirmed.

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March 11, 2015

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, Order from the South Carolina Supreme Court entitled, "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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PROOF OF SERVICE

I, Sally B. Ellison, certify I served the Final Brief of Respondent Appellant by depositing 2 copies in the United States mail, postage prepaid, addressed to:

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

This 11th day of March, 2015.

Sally B. Ellison

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