STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

G. Thomas Cooper, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

REGINALD L. GORDON,

APPELLANT

APPELLATE CASE NO. 2014-002555

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in finding Appellant's statement to law enforcement was voluntary where the interrogating officer failed to disclose his extramarital affair with the mother of Appellant's co-defendant?

STATEMENT OF THE CASE

On October 7, 2013, a Charleston County grand jury indicted Appellant for murder (2013-GS-10-5815) and possession of a firearm during the commission of a violent crime (2013-GS-10-5816). R. * (indictments). The state, represented by Bruce Durant, called the case for trial before the Honorable G. Thomas Cooper and a jury on November 17-20, 2014.[1] Michael DeTreville represented Appellant. Tr. 1. The jury found Appellant guilty as charged. Tr. 781, line 12 – Tr. 782, line 8. Judge Cooper sentenced Appellant to thirty years' imprisonment for murder and five years' imprisonment for the firearm. He ordered the sentences to be served concurrently. Tr. 793, lines 1-14; R. *(sentence sheets).

Appellant filed a notice of appeal. This brief now follows.

[1] The Honorable Roger Young granted Appellant a continuance on July 18, 2014 to investigate the role of a detective in the case in light of the state's recent disclosure that the detective was involved in a sexual relationship with Appellant's co-defendant's mother. Motion Tr. 1-8.

STATEMENT OF FACTS

On August 17, 2012, Domonique Grant, her younger sister, and several of her friends went to the Purple Mirage, a nightclub in Charleston. Tr. 168, lines 2-4; Tr. 169, lines 1-22. Appellant and his friends, including Derrick "Scrappy" Brown, also enjoyed the evening at the nightclub. Tr. 207, line 12 – Tr. 208, line 1; Tr. 213, lines 13-15; Tr. 284, lines 12-15. Some of the patrons argued. Tr. 208, lines 16-19; Tr. 225, lines 20-23; Tr. 226, lines 2-5; Tr. 228, lines 13-20; Tr. 235, line 22 – Tr. 236, line 10; Tr. 284, lines 16-21. Darnell Chaplin, Appellant's cousin, "got into a little scuffle with some males from downtown." Tr. 210, lines 20-25; Tr. 216, lines 2-18; Tr. 212, lines 14-20.

When the Purple Mirage closed, many, including Appellant and Grant, went to Frazier's, a nightclub in Ravenel. Tr. 171, lines 15-22; Tr. 203, lines 8-15; Tr. 212, lines 21-24; Tr. 213, lines 16-17; Tr. 286, lines 11-13. Lionel "Tootie" Blair claimed that Appellant and others approached him at Frazier's asking if he had been at Purple Mirage. A verbal argument ensued between Tootie and the group, which was quickly resolved by one of the artists performing at the club. Tr. 239, line 1 – Tr. 240, line 17.

Around 4 a.m., Grant, her sister, and her friend went to the friend's car to leave. Grant had agreed to drive her friend's car because her friend was too intoxicated. Tr. 173, line 9 – Tr. 174, line 20; Tr. 195, lines 2-7. Tootie walked Grant to her car as he continued his evening-long attempt to woo her. Tr. 174, line 21 – Tr. 175, line 17; Tr. 193, lines 9-15; Tr. 195, lines 11-25; Tr. 241, line 22 – Tr. 243, line 3.

Although Tootie claimed he was standing at the driver's side window talking to Grant when the shooting started, his prior statement to police and the testimony of others indicated he was standing behind the car or on the passenger side. Tr. 201, line 8 – Tr.

202, line 8; Tr. 243, line 19 – Tr. 244, line 19; Tr. 254, lines 18-24. In fact, Grant's sister, who was sitting in the backseat behind Grant, said the shooting started two to three minutes after Grant closed the driver's side door and Tootie walked away. Tr. 176, lines 8-11; Tr. 181, lines 7-14. During the shooting, the car's owner opened the passenger door and crawled out. Tootie met her on the side and told her to get back into the car. Tr. 196, lines 18-25. Tootie was crawling on his hands and knees around the back of the car to the passenger side. Tr. 197, lines 1-11; Tr. 246, lines 1-4. Tootie then ran from the scene. Tr. 247, lines 6-10.

After approximately six shots were fired, the group realized Grant had been shot. Tr. 177, lines 3-17; Tr. 197, lines 15-20; Tr. 246, lines 5-12. Grant's sister saw someone wearing all black running around the back of Frazier's immediately after the shooting. Tr. 177, lines 18-25.[2]

The Charleston County Sherriff's Office received the call for help at 4:03 a.m. on August 18, 2012. The first officer arrived at the scene at 4:14 a.m. Tr. 152, lines 3-24; Tr. 153, lines 8-15. Emergency Medical Services arrived and pronounced Grant dead at the scene. Tr. 158, lines 2-5. Although a large crowd had gathered around the incident location, none claimed to have seen the shooting and no one could provide the name of the shooter, including Grant's sister who was sitting in the back seat at the time of the shooting. Tr. 158, lines 12-14; Tr. 163, lines 4-14; Tr. 176, lines 21-23; Tr. 197, lines 12-14; Tr. 247, lines 15-16.

A short distance from Frazier's, but in the city's jurisdiction, there was a fight between Appellant and others at a gas station around 4:10 a.m. on August 18, 2012. Tr.

299, lines 2-19; Tr. 318, lines 16-25. Appellant was not at the store when the police arrived. Tr. 300, lines 4-6. However, he returned shortly and the officer intercepted him. Appellant was not charged with any crime relating to the fight at the gas station. Tr. 305, lines 18-19; Tr. 308, lines 8-9.

The police found an unlocked, abandoned car at the gas station, which they connected to Appellant through Juwan "Rambo" Smalls. Tr. 300, lines 7-20; Tr. 325, lines 2-4. According to Smalls, he "rented" the car from its owner in exchange for crack. Further, Smalls claimed that he left the rented car in Appellant's possession after leaving Frazier's. Tr. 283, line 10 – Tr. 288, line 24. Inside the car, the police found a handgun. Tr. 300, lines 21-24; Tr. 309, lines 12-22. According to forensic testing, a shell casing found at the shooting scene outside of Frazier's was fired by the handgun. Tr. 493, lines 12-24. The officer had the car towed to a private towing yard. Tr. 311, lines 24-25. Later, the car was released to the owner. Days later, the Sheriff's Office seized the car, but found no physical evidence connecting the car to Appellant. Tr. 425, line 19 – Tr. 432, line 25.

[2] It was undisputed that on the night of Grant's death, Scrappy was wearing all black and that Appellant was wearing a yellow shirt. Tr. 225, lines 1-9; Tr. 228, lines 9-12.

ARGUMENT

The trial judge erred in finding Appellant's statement to law enforcement voluntary where the interrogating officer failed to disclose his extramarital affair with the mother of Appellant's co-defendant.

Relevant facts

Pretrial hearing testimony

Mitch Wilson, with the Charleston County Sheriff's Department, was the lead detective in the case involving Grant's death. Tr. 66, lines 12-14. On September 1, 2012, Wilson learned that Appellant had been arrested by the Charleston Police Department on an unrelated charge.[3] He removed Appellant from the jail and attempted to interrogate him at his office, but Appellant refused to waive his rights to silence and counsel. Tr. 66, line 20 – Tr. 67, line 7; Tr. 69, lines 7-13; R. * (State's #59). On November 10, 2012, Wilson attempted to interrogate Appellant again regarding Grant's death. At that time, Appellant was being interviewed by the sheriff's office regarding the death of a member of his family. Wilson's supervisor suggested that Wilson attempt to interrogate Appellant again despite his earlier invocation. Tr. 69, line 22 – Tr. 70, line 17. Once again, Appellant invoked his constitutional rights. Tr. 71, lines 15-19; R. * (State's # 60).

However, on February 13, 2013, Appellant was arrested for murder in connection with the death of Grant. Tr. 72, lines 4-7. Wilson did not attempt to speak to Appellant again. Tr. 72, lines 8-11. Nevertheless, former Detective Charles Lawrence, alone, interrogated Appellant. Tr. 72, line 12 – Tr. 73, line 18. Lawrence claimed his

[3] At the time, Appellant had not been charged with murder or any crime relating to the death of Grant. Tr. 67, lines 5-7.

interrogation of Appellant was at the request of Appellant's mother. Tr. 74, line 22 – Tr. 75, line 6. According to Lawrence, Appellant's sister said "her brother knew more about the information than what he was saying." Tr. 75, lines 9-13. Lawrence had Appellant transported from the jail to the sheriff's office. Thereafter, Lawrence permitted Appellant and his sister to talk for about ten minutes. Then, Appellant's sister indicated Appellant "was ready to talk to" Lawrence. Tr. 75, line 18-23.

Lawrence advised Appellant of his rights, and Appellant waived his rights. Tr. 76, line 6 – Tr. 78, line 22; R. * (State's Exhibit #57). Lawrence's subsequent interrogation of Appellant was captured on video. State's Exhibit #58. During the interview, Appellant made numerous references to an individual nicknamed "Scrappy." In fact, Appellant revealed that Scrappy had shot Grant.[4] Lawrence indicated he knew Scrappy was Derrick Brown's nickname. He also knew Scrappy's family. Tr. 80, line 15 – Tr. 81, line 7; Tr. 101, lines 7-22.

During the pretrial hearing, Lawrence was forced to reveal that he was investigated by the Charleston County Sheriff's Department for engaging in a sexual relationship with Scrappy's mother. Tr. 81, lines 13-18. In fact, Lawrence lied about the relationship during the investigation. Tr. 81, lines 19-25. Lawrence and Scrappy's mother colluded to create a false timeline of their relationship during the internal investigation. Tr. 82, line 21 – Tr. 83, line 3; Tr. 83, lines 10-16; Tr. 89, line 23 – Tr. 90, line 3. Despite Lawrence's protestations that he was not sure when his sexual

[4] Scrappy was arrested for murder following Appellant's statement. At the time of Appellant's trial in November 2014, the charges were still pending. Tr. 95, lines 13-21; Tr. 573, lines 16-18. However, the charges were dismissed by the prosecutor in December 2014 according to the Charleston County Clerk of Court's records.

relationship with Scrappy's mother started and his testimony that "[t]here was no relationship" in October 2012 when Scrappy was arrested on unrelated charges, the Sheriff's Department's investigation revealed Lawrence was engaged in an illicit affair with Scrappy's mother when Scrappy was arrested in October 2012, which was about three months before he interrogated Appellant. Tr. 82, lines 9-10; Tr. 83, lines 4-9; Tr. 84, lines 11-16; Tr. 85, line 23 – Tr. 86, line 12.

Lawrence explained why Appellant and Appellant's mother would trust him more than other detectives. When he was a deputy, he patrolled the area where Appellant and his family lived. Lawrence went "out of the way to make it right for everyone in that area ... [b]ecause number one, it's mostly blacks. ... And [h]e ha[d] to bend the rules a lot of time to try to make it right for the people that a lot of time they feel they're getting unfair treatment." He explained that was all he ever did, but "this came back to bite" him. Tr. 92, lines 1-9.

Although admitting that he had a conflict of interest during his interrogation of Appellant, Lawrence attempted to justify his conduct by stating that Appellant's mother asked him to interrogate Appellant because she trusted Lawrence and another detective had threatened to lock up Appellant for the rest of his life. Tr. 86, line 13 – Tr. 87, line 7.

Appellant testified that he was not aware of the sexual relationship between Lawrence and Scappy's mother when he waived his rights and agreed to speak to Lawrence on February 15, 2013. Tr. 97, lines 19-25. Further, he testified that if he had known about the illicit affair, he would not have waived his rights and provided a statement to Lawrence. Tr. 98, lines 11-15.

Appellant's motion to suppress

Appellant requested suppression of the statement "under a totality of the circumstances analysis under Jackson v. Denno[, 378 U.S. 368 (1964)]." Tr. 105, lines 10-15. Specifically, Appellant argued "the failure to disclose a conflict of interest by the interrogating officer is tantamount to a misrepresentation by that police officer; by not saying that 'I'm telling you that I don't have a conflict of interest.'" Tr. 105, lines 16-22. Further, Appellant explained that "[p]olice misrepresentations are certainly one of the areas ... under Jackson v. Denno[, 378 U.S. 368 (1964)] that can cause a statement to be suppressed. To make a finding that the statement was not given freely and voluntarily or that [Appellant] did not intelligently, knowingly and intelligently [*sic*] waive his rights." Tr. 105, line 23 – Tr. 106, line 5. Appellant continued that Lawrence was aware of his conflict of interest, but failed to disclose it, thereby creating an active misrepresentation. Tr. 106, lines 11-21. Thus, Appellant argued that "[u]nder the totality of the circumstances ... [Appellant] was deprived of the ability to make a knowing and intelligent decision regarding waiver of his rights." Tr. 106, line 22 – Tr. 107, line 1. "[E]ssentially ... his will was overcome ... that he was not able to freely and voluntarily give a statement to Detective Lawrence; that he would not have done so had he been aware of all the facts and circumstances existing at the time." Tr. 107, lines 1-10.

The state argued that Appellant "was advised of his rights" and "he understood his rights." The state also relied upon the two prior occasions during which Appellant was advised of his rights and invoked his rights to support its argument that Appellant understood his rights. Tr. 107, lines 12-20. Noting the video of the interrogation, the state argued Appellant "was not coerced, not threatened, there was nothing in there but

him falling all over himself trying to give somebody else up for this murder." Tr. 107, lines 21-25. More to the point, the state argued that Lawrence's failure to disclose his sexual relationship with Scrappy's mother was not a misrepresentation at all because Scrappy was arrested as a result of the interrogation. Tr. 108, lines 6-16.

On this point, the judge expressed his view that Scrappy's arrest following Appellant's statement "would tend ... to negate [Appellant]'s argument of accusing - - if the witness here had not accused him, Detective Lawrence's friend, resulting in the indictment of her son, I don't see the conflict." Tr. 108, line 25 – Tr. 109, line 5. Appellant argued that "from the moment that Scrappy is mentioned in this statement, so to speak, would have been an appropriate time for Detective Lawrence to disclose to [Appellant] that ... or stop the interview." Tr. 109, line 21 – Tr. 110, line 4. Appellant noted the large number detectives employed by Charleston County Sheriff's Office and their availability to interview Appellant in Lawrence's stead. Tr. 110, lines 5-21.

The judge's ruling

The trial judge agreed "that would have been good judgment on Detective Lawrence's part." However, the judge determined Lawrence's failure to disclose his relationship with Scrappy's mother did not affect the voluntariness of Appellant's statement. Tr. 110, line 22 – Tr. 111, line 4. The judge noted that he had considered the evidence offered by the state and found "that before the alleged statement was obtained, [Appellant] was fully advised of his rights under the Fifth and Sixth Amendments of the Constitution of the United States." He found Appellant was advised of his rights on three separate occasions. Tr. 111, line 5 – Tr. 112, line 23. He concluded Appellant "knowingly and intelligently waived his rights under the Fifth and Sixth Amendments to

the Constitution of the United States and the Constitutional safeguards required by Miranda v. Arizona, [384 U.S. 436 (1966)], as evidenced by the fact that on two occasions he refused to answer any questions after being advised of his rights." Tr. 112, line 24 – Tr. 113, line 6. He continued: "the alleged statement obtained from [Appellant] was freely and voluntarily given without duress, without coercion, without undue influence, without reward, without promise or hope of reward, without promise of leniency, without threat of injury." The judge opined that he did not see "anything in that statement that made [him] think that he was under any compulsion or misrepresentation or anything else." Tr. 113, lines 7-24; Tr. 114, lines 2-4. Thus, he held the statement was admissible. Tr. 114, lines 5-8.

Trial testimony

Before the jury, Lawrence confirmed that he interrogated Appellant on February 15, 2013. Tr. 565, lines 5-10. He claimed that Appellant's mother requested the interrogation because another investigator had threatened to lock up Appellant "all of his life." Tr. 565, lines 11-18. Lawrence claimed that Appellant's sister arrived at the sheriff's office, stating Appellant knew more than he was saying and requesting to speak with him. Lawrence permitted the two to speak. Tr. 566, lines 1-17. When Appellant's sister left, Lawrence entered the interrogation room. He advised Appellant of his rights, and Appellant agreed to speak with him. Tr. 566, line 18 – Tr. 567, line 2. Thereafter, Appellant's statement was played for the jury over his objection. Tr. 571, lines 11-15; Tr. 576, line 8 – Tr. 577, line 8.

Lawrence admitted he had engaged in a sexual relationship with Scrappy's mother, lied about the affair, and was fired due to the relationship and his attempts to

cover up the relationship. Tr. 571, line 19 – Tr. 573, line 8; Tr. 579, lines 2 – 24; Tr. 581, lines 1-15. However, Lawrence again claimed he was not engaged in a sexual relationship with Scrappy's mother at the time of Appellant's arrest for murder. Tr. 579, line 25 – Tr. 580, line 15. Again, he was confronted with the findings of the internal investigation that his relationship was on-going at the time of Scrappy's arrest in October 2012 on an unrelated matter. Tr. 583, line 4 – Tr. 586, line 16; R. * (Defendant's Exhibit #3).

Cross-examination revealed that Lawrence had lied to his superior officers previously as well. Tr. 589, lines 13-22. While he was investigating a missing person's case, Lawrence informed his supervisor in writing that he had visited the person's house when he had not done so. He attempted to justify his misrepresentation by noting that he found the missing person and that he was suspended for only one day. Tr. 590, line 1 – Tr. 591, line 12.

Lawrence proved himself completely untrustworthy when he lied during his testimony concerning how he found the only piece of physical evidence in the case. Although Grant was shot six times, no shell casings were found at the scene on the night of the shooting. Initially, the officers assumed a revolver was used. Tr. 420, lines 1-7. When the officers learned from the pathologist that a semi-automatic was likely used, several officers, including Lawrence, returned to the scene to search again on August 20, 2013. Tr. 595, lines 10-16; Tr. 597, lines 3-18.[5] Lawrence found the *only* shell casing recovered from the scene. He explained to the jury how he was so fortuitous:

[5]When Appellant requested a continuance to investigate the extent of Lawrence's role in the investigation, the state claimed that "[t]he only thing ... that Detective Lawrence did of note in this case was to conduct the interview of [Appellant] on February 15, 2013; all

> During the interview, if you recall when someone stuck their head in and gave a sheet of paper to me, at which time I was interviewing [Appellant], he showed me a diagram of where the vehicle was in relationship to where he was and where Scrappy was.
>
> And so based on me knowing the area, based on the diagram that [Appellant] gave me, I went to the car, where the car was there. I can see the tinted windows where the glass was on the ground, in the grass. And based on the approximation of the feet that [Appellant] gave me, I started a little further back from that. Then I started coming to the vehicle as to where [Appellant] said that the gunshots came from, at which point in time I was stepping close, with my feet really close together. I stepped on a casing. And as soon as I stepped on it, I notified Sergeant Manigault, who was the senior person out there at that time. And I stepped off of it, at which point it was myself, two investigators and another tech, all witnessed that one casing. I never touched it. Other than that, it was picked up by them and logged into evidence.

Tr. 597, line 22 – Tr. 598, line 23.

Inexplicably, Lawrence claimed that on August 20, 2012, when he found the only shell casing recovered from the scene, he was equipped with a diagram from his interrogation of Appellant on February 15, 2013. He again claimed that the portion on the video where someone knocked on the door was when the person gave him a piece of paper, which he used to ask Appellant to explain the scene. Tr. 607, lines 9-20. When he was confronted with his obvious lie – the interrogation occurred in February of 2013 and the search of the scene occurred in August of 2012, Lawrence responded, "Okay. Okay, yeah." He added, "I stand corrected." Nevertheless, he launched into yet another explanation of how he found the shell casing – finding the broken glass from the driver's side of the car, using the "pattern of the bullets to the window," knowing the shooter was close based on something an investigator said, and his sixteen years of experience as a

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of which is audio and videotaped." Motion Tr. 4, lines 3-9. Further, the state assured the judge that the *only* item of evidence the state intended to introduce through Lawrence was the statement. Motion Tr. 5, lines 3-6.

law enforcement officer and military police officer. He was unwilling to call his earlier testimony regarding the diagram a lie, however. He admitted he was wrong, but denied he was lying: "Not a lie but wrong." Tr. 607, line 21 – Tr. 609, line 3.

Discussion

In Miranda v. Arizona, 384 U.S. 436, 444 (1966), the United States Supreme Court held "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." In Jackson v. Denno, 378 U.S. 368, 376 (1964), the United States Supreme Court held that "a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession."

To introduce a statement produced during custodial interrogation, the prosecution must prove by a preponderance of the evidence that the statement was made freely and voluntarily, and taken in compliance with Miranda v. Arizona, 384 U.S. 426 (1966). State v. Goodwin, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009); State v. Miller, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct. App. 2007). In South Carolina, a court must examine the totality of the circumstances surrounding the custodial statement. The examining court must answer the question: did totality of the circumstances surrounding the custodial statement defeat the defendant's will? State v. Moses, 390 S.C. 502, 513, 702 S.E.2d 395, 401 (Ct. App. 2010).

> Courts have recognized appropriate factors that may be considered in a totality of the circumstances analysis: background; experience; conduct of the accused; age; maturity; physical condition and mental health; length of custody or detention; *police misrepresentations*; isolation of a minor from

> his or her parent; the lack of any advice to the accused of his constitutional rights; threats of violence; direct or indirect promises, however slight; lack of education or low intelligence; repeated and prolonged nature of the questioning; exertion of improper influence; and the use of physical punishment, such as the deprivation of food or sleep.

Id. at 513-514, 702 S.E.2d at 401 (internal citations omitted).

Lawrence knew that Appellant and his family were inclined to trust Lawrence because of his reputation in the community. What Appellant and his family did not know was that Lawrence's loyalties were with his paramour and her son, the shooter. In continuing the interrogation, Lawrence actively misrepresented the situation to Appellant. Many times, a person's previous invocation is used as proof that a waiver is voluntary and knowing. However, in this case, Appellant's previous invocation is proof positive that he would not have waived his rights *but for* Lawrence's misrepresentations.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and sentences and remand for a new trial.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of September, 2015.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

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G. Thomas Cooper, Circuit Court Judge

THE STATE,

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V.

REGINALD L. GORDON,

APPELLANT

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 Mr. Reginald L. Gordon, #342932, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 29th day of September, 2015.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 29th day of September, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.