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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

The Honorable Edgar J. Dickson
Appellate No.: 2012-212566
Indictment Nos.: 2011-GS-38-0114, 0124

The State..... Respondent

vs.

Darius Ransom-Williams.....Appellant.

PETITION FOR REHEARING

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Pursuant to Rule 221, SCACR, Appellant, Darius Ransom-Williams, hereby submits his Petition for Rehearing.

This matter came before the Court upon Appellant's direct appeal from his criminal conviction and sentences. Appellant was indicted under 2011-GS-38-0114 and -0124 for burglary in the first degree and attempted murder. An Orangeburg County jury found Appellant guilty of burglary in the first degree and assault and battery of a high and aggravated nature (ABHAN). Appellant was sentenced to an aggregate term of thirty years' imprisonment.

During the pendency of this appeal, there were significant delays in the delivery of the trial transcript. Almost a year after the trial, the trial's court reporter's tapes and notes were delivered to Court Administration for their handling. After the tapes were transcribed, it was discovered that tapes were missing and portions of the present tapes were inaudible—resulting in no transcription of a Batson v. Kentucky, 476 U.S. 79 (1986) hearing and the closing arguments of both the solicitor and trial counsel. This Court granted a motion for remand and reconstruction on December 11, 2013.

The reconstruction hearing was held before the Honorable Judge Dickson in Orangeburg County on January 3, 2014. Judge Dickson issued an Order, filed January 22, 2014, finding the reconstructed proceedings should be included in the Record on Appeal and that the transcript was sufficient for appellate review. Appellant timely served a Rule 59(e), SCRCP, Motion for Reconsideration and Supporting Memorandum on January 27, 2014. By order filed January 31, 2014, Judge Dickson denied the Motion for Reconsideration.¹

The parties briefed the issues on Appeal, and this Court granted Oral Argument, which was held in November of 2015. By Opinion filed January 20, 2016, this Court affirmed

¹ It should also be noted that the Reconstruction Transcript was not delivered until over seven (7) months after the Reconstruction hearing.

Appellant's convictions and sentences. This Petition for Rehearing follows.

I. This Court misapprehended the law with regard to reconstructed proceedings, and erred in finding that the reconstructed record was sufficient for appellate review.

As articulated in the briefs and the Record before this Court, the Batson motion and the closing arguments from Appellant's trial were not transcribed in the official record of the proceedings. This Court ordered a reconstruction hearing. During the reconstruction hearing, the Solicitor and Public Defender attempted to reconstruct their closing arguments by reading their respective closing argument outlines into the record. However, this attempt did not create a sufficient record for appellate review because it did not reflect any objections made during the closing arguments at trial or any rulings on any said objections by the trial court.

In its Opinion, this Court found that the Record was sufficient for appellate review and seemed to find that Appellant had not articulated a specific appellate claim that this Court could not review. However, this was in error. Specifically, Appellant articulated his inability to challenge the propriety of the Solicitor's closing argument as the specific appellate claim that he was unable to articulate.

In addition, it was improper for this Court to rely on Sweat v. Crawford, 292 S.C. 324, 327, 356 S.E.2d 147, 149 (Ct. App. 1987), a civil case, to find that Appellant was not prejudiced by the omissions from the record.

A defendant complaining of a defective transcript is entitled to a new trial if the defendant "establishes that the incomplete nature of the transcript prevents the appellate court from conducting meaningful appellate review." See Adams v. H.R. Allen, Inc., 397 S.C. 652, 656-57, 726 S.E.2d 9, 12 (Ct. App. 2012) ("[T]he reconstructed record must allow for meaningful appellate review."). Therefore, "before a defendant can establish that he is entitled to a new trial on the basis of an inadequate reconstructed record, he must identify a specific

appellate claim that [an appellate court] would be unable to review effectively using the reconstructed record.” Id. at 325, 644 S.E.2d at 273.

Here, the reconstructed record is insufficient for appellate review because the reconstruction is woefully deficient in presenting an adequate review of the closing arguments. On appeal, the appellate court must review the impropriety of a solicitor’s closing argument *in the context of the entire record*. See Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998) (emphasis added). The appellant has the burden of proving he did not receive a fair trial because of an alleged improper argument by the solicitor. See Humphries v. State, 351 S.C. 362, 373, 570 S.E. 2d 160, 166 (2002).

Here, Appellant can never meet this burden because the reconstruction of the closing arguments does not fully and accurately demonstrate what transpired during the closing arguments. Merely reading the closing argument outlines, as was done in this case, cannot capture the full extent and context of the closing argument. As conceded by the Solicitor during the reconstruction hearing, “I don’t really see any way I can word-for-word attempt to come back and say what I said to the jury a year and a-half ago.” Furthermore, the reading of the outlines does not reflect any objections or arguments related thereto for appellate review. Accordingly, Appellant cannot raise any issues related to the solicitor’s closing arguments or whether the trial court correctly ruled on any objections made during closing arguments because the record is incomplete. No reconstruction could sufficiently cure this error and Appellant is forever precluded from raising any errors related to the solicitor’s closing argument at his trial. *This is the specific appellate claim—prejudicial statements made by the solicitor—that this Court is unable to review.* See also United States v. Rivera, 444 Fed.Appx. 774, 779 (5th Cir. 2011) (“If a defendant is represented by different counsel on appeal than at trial, the absence of a

substantial and significant portion of the record is sufficient to warrant reversal for a new trial.”) (internal citations omitted); United States v. Selva, 559 F.2d 1303, 1306 (5th Cir. 1977) (reversing a conviction because the transcript did not contain the closing arguments made by either counsel and information about the closing argument was unavailable to the attorney on appeal); Jones v. State, 780 So.2d 218 (Fl. Ct. App. 2001) (finding the omission of the State’s closing argument compels the grant of a new trial, reasoning that an improper closing argument, standing alone, can be grounds for reversal, and the appellant was prejudiced “by the incomplete transcript because his appellate attorney is incapable of reviewing the State’s closing argument to determine the presence or absence of reversible error.”).

Additionally, this Court erred in relying on Sweat v. Crawford to find Appellant was not prejudiced because the evidence in the record sufficiently supported the findings of fact made by the referee. Sweat, a civil case, analyzed the sufficiency of the record in terms of the South Carolina Rules of Civil Procedure as it applies to proceedings before masters and special referees. Sweat does not analyze the issue in terms of a criminal case. In criminal proceedings, especially as here, the omission of certain parts of the trial could implicate violations of a Defendant’s constitutional rights in ways not contemplated in civil cases or by the civil rules.

This Court erred in affirming the trial court’s finding the record was sufficient for appellate review. Accordingly, this Court must grant Appellant’s Petition for Rehearing, reverse the trial court, and remand this case for a new trial.

II. Alternatively, this Court erred in finding that Appellant’s confession was properly admitted.

On the instant record, Appellant’s confession was obtained in violation of his constitutional rights. Accordingly, it was error for the trial court to have included his confession

at trial. Respectfully, this Court erred in holding the circuit court properly held Edwards v. Arizona, 451 U.S. 477 (1981), did not mandate suppression of Appellant's statements.

As the Court is aware, "a confession is like no other evidence." Arizona v. Fulminante, 499 U.S. 279, 296 (1991). A confession is often the most probative and damaging evidence that can be admitted against a defendant. Id. Therefore, "[a] criminal defendant is deprived of due process if his conviction is founded, in whole, or in part, upon an involuntary confession." State v. Pittman, 373 S.C. 527, 565, 647 S.E.2d 144, 164 (2007) (citing Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774 (1964)).

In this case, Appellant's confession was the single and strongest piece of evidence from which the jury could determine his guilt. Without the confession, the State had little evidence to establish Appellant's guilt. Appellant's confession taken in violation of his constitutional rights, discloses motive and means and profoundly impacted the jury.² See Fulminante, 499 U.S. at 296 ("While some statements by a defendant may concern isolated aspects of the crime or may be incriminating only when linked to other evidence, a full confession in which the defendant discloses the motive for and means of the crime may tempt the jury to rely upon that evidence alone in reaching its decision. In the case of a coerced confession such as that given by Fulminante to Sarivola, the risk that the confession is unreliable, coupled with the profound impact that the confession has upon the jury, requires a reviewing court to exercise extreme caution before determining that the admission of the confession at trial was harmless."); U.S. v. Johnson, 400 F.3d 187 (4th Cir. 2005) (after finding a statement was improperly admitted, the Fourth Circuit reasoned the admission was harmless error because the confession was not a full

² This issue further illustrates the devastating impact of not having a true transcript of the closing arguments because this Court cannot accurately determine how much the State's case rested on the confession and the weight the State afforded to the confession when arguing its case to the jury.

confession in which the defendant disclosed the motive for and means of the crime).

a. This Court erred in finding that the admission of Appellant’s confession was not in violation of the mandates of Edwards v. Arizona.

“[A]n accused having expressed his desire to deal with the police only through counsel is not subject to further interrogation by the authorities until counsel has been made available to him, *unless the accused himself initiates further communication, exchanges, or conversations with the police.*” Edwards 451 U.S. at 484-85 (emphasis added); State v. Henderson, 286 S.C. 465, 334 S.E.2d 519 (Ct. App. 1985) (recognizing that once the right to counsel has been asserted, questioning of the suspect must cease until counsel is either obtained for the suspect or retained by him; only in instances when the suspect initiates subsequent conversations or communications with the investigating authority is a waiver of the right to counsel possible).

If the police do subsequently initiate an encounter in the absence of counsel (assuming there has been no break in custody), the suspect’s statements are presumed involuntary and therefore inadmissible as substantive evidence at trial, even where the suspect executes a waiver and his statements would be considered voluntary under traditional circumstances.

McNeil v. Wisconsin, 501 U.S. 171, 177 (1991). “Police officers simply cannot continue to question a suspect despite his request for counsel ‘in the hope that he might be induced to say something casting retrospective doubt on his initial statement that he wished to speak through an attorney or not at all.’” Johnson, 400 F.3d at 194 (citing Smith v. Illinois, 469 U.S. 91 (1984)). The United States Supreme Court has determined that two elements be examined to determine whether the police have obtained a statement in violation of Edwards. Johnson at 193.

A court must determine whether the accused actually invoked his right to counsel. If he did, the court must determine who initiated the further discussion that yielded the eventual statement. If an accused, after invoking his right to counsel did not initiate further discussions with the police or knowingly and intelligently waive the right he had invoked, any statement procured by the police is inadmissible at trial.

Id. (citing Smith at 95)).

After Edwards and Smith, some jurisdictions have recognized “that defendants can, after invoking their Fifth Amendment right to counsel, reinitiate contact with the police via a third party.” In re Tracy B., 391 S.C. 51, 63, 704 S.E.2d 71, 77 (Ct. App. 2010); see e.g. VanHook v. Anderson, 488 F.3d 411, 428 (6th Cir. 2007) (holding when police receive information from a third party which might evince a willingness and a desire to talk by the suspect, this is enough to justify a limited inquiry with the suspect to confirm or disaffirm that belief).

This Court relied on In re Tracy B. to support its ruling. However, the instant case is more factually similar to State v. Anderson, 357 S.C. 514, 593 S.E.2d 820 (Ct. App. 2004). In Anderson, the defendant was arraigned for murder and completed documentation requesting the services of a public defender. Anderson at 518, 593 S.E.2d at 822. Later that day, the defendant’s aunt visited him at the police station and after the visit the aunt suggested to the investigating police officer that he go talk to the defendant again. Id. The officer went to talk to the defendant, read him his Miranda warnings, asked him if anything had changed, and the defendant subsequently made a self-incriminating statement. Id.

In Tracy, this Court distinguished Anderson from Tracy, finding that in Anderson the aunt merely suggested to police that they go talk to the defendant, not that the defendant himself wanted to talk to them. Tracy at 63, 704 S.E.2d at 77. In contrast in Anderson, this Court reasoned, that after speaking with the appellant, the mother in Tracy informed police the appellant wanted to talk to them. Id. Thus, this court held that “while Anderson arguably did not reinitiate contact via his aunt, [the appellant in Tracy] did reinitiate contact through his mother.” Id.

The facts and circumstances herein clearly demonstrate the trial court erred in finding the confession was obtained in accordance with Edwards and its progeny. *Importantly, the trial*

court specifically found that the police contact was reinitiated by Mother and not Appellant. Consequently, the trial court then abused its discretion in allowing the confession to be admitted because the law clearly states that the contact has to be reinitiated by the defendant himself. See Brockmeyer, at 340, 751 S.E.2d at 653 (“An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.”). Even if the contact comes through a third-party, the contact must be at the behest of the defendant. Appellant, Mother, and Shumpert testified that Mother told police to speak with Appellant.

Respectfully, this Court’s opinion seemingly overlooks the fact that the trial court specifically found Appellant’s mother reinitiated contact with the police, not Appellant. Under these facts, this case more closely resemble the Anderson case rather than Tracy. Appellant’s mother’s actions of telling Appellant to tell Shumpert the truth and telling Shumpert to get the truth out of Appellant are more closely akin to the aunt in Anderson rather than the mother in Tracy. Mother testified that when Shumpert approached Appellant regarding a statement, Appellant indicated he did not want to speak to Shumpert and Mother told Appellant he had to speak to Shumpert. There is overwhelming evidence Mother initiated the subsequent interrogation. The trial court correctly made this finding. However, having found Mother reinitiated the contact, the trial court committed reversible error by finding the statement was admissible. *A finding that anyone but Appellant reinitiated the contact with police forecloses any possibility that the statements were admissible.* See Johnson, at 194 (“Police officers simply cannot continue to question a suspect despite his request for counsel ‘in the hope that he might be induced to say something casting retrospective doubt on his initial statement that he wished to speak through an attorney or not at all.’”) (citing Smith, at 91).

Additionally, there was no break in custody or any other circumstances authorizing police

to interrogate Appellant without the presence of his requested attorney. See Id., McNeil, at 77. During Appellant's first encounter with Shumpert, he requested an attorney. Appellant should have been constitutionally protected from subsequent police interrogation without the presence of his attorney. Instead, Mother's interference was inappropriate and it was improper of police to rely on her statements to serve as a waiver of Appellant's constitutional rights. It is impermissible for Mother or any third-party to waive Appellant's constitutional rights. However, because police acted on Mother's purported waiver of Appellant's rights, the police violated Appellant's rights when they obtained Statements 2 and 3. Anything obtained after the impermissible re-initiation of the interrogation was inadmissible at trial.

This Court erred in finding the provisions of Edwards v. Arizona did not warrant the suppression of Appellant's statements.

b. This Court erred in finding that Appellant's confession was voluntary.

This Court erred in finding that Appellant's statements were freely and voluntarily given. "A statement obtained as a result of a custodial interrogation is inadmissible unless the subject is advised of and voluntarily waived his rights." State v. Miller, 375 S.C. 370, 379, 652 S.E.2d 444, 449 (Ct. App. 2007) (citing Miranda v. Arizona, 384 U.S. 439, 498-500, (1966)). If a suspect is advised of his Miranda rights, but makes a statement, the burden is on the State to prove by a preponderance of the evidence that his rights were voluntarily waived. Id.

The voluntariness is in addition to the intelligent waiver mandate of Miranda. Miller at 380, 652 S.E.2d at 449. A statement is not admissible unless it is voluntary. Id. Courts have reasoned that, "when a State compels testimony by threatening to inflict potent sanctions unless the constitutional privilege [against self-incrimination] is surrendered, that testimony is obtained in violation of the Fifth Amendment and cannot be used against the declarant in a subsequent

criminal prosecution.” Lefkowitz v. Cunningham, 431 U.S. 801, (1977).

It is now inescapably clear that the Fourteenth Amendment forbids the use of involuntary [statements] not only because of the probable unreliability of [statements] that are obtained in a manner deemed coercive, but also because of the “strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a [statement] out of an accused against his will,” and because of “the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.

Jackson, at 65-66.

The trial judge must examine the totality of the circumstances surrounding the statement to determine whether the State carried its burden in showing the statement was made voluntarily. Miller at 389, 652 S.E.2d at 450. “The test of voluntariness is whether a defendant’s will was overborne by the circumstances surrounding the given statement.” Id. (internal citations omitted). “The due process test takes into consideration the totality of the circumstances—both the characteristics of the accused and the details of the interrogation.” Id. (citing Dickerson v. United States, 530 U.S. 428, 434, (2000)). Some factors which may be considered in the totality of the circumstances analysis include police coercion, length of the interrogation, its location, its continuity, and the defendant’s maturity, education, physical condition, and mental health. See Withrow v. Williams, 507 U.S. 680, (1993).

Here, the record is devoid of any consideration of the above factors by the trial judge. The trial judge’s finding was limited to stating Appellant received his Miranda rights; that he understood those rights, and that he voluntarily made the statements. The trial judge made no analysis of any other relevant factors applicable to the voluntariness of Plaintiff’s statements – including the presence is of coercion or consideration of Appellant’s educational background.

c. The admission of the statements was not harmless.

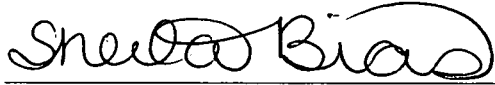
This Court's opinion does not address, in complete degree, the harm caused by the admission of Appellant's statements. However, the trial judge's error in admitting the statements was not harmless. See Henderson, 286 S.C. at 470, 334 S.E.2d at 522 ("Having determined that Edwards barred the admissibility of the defendant's confession, we now consider whether the error was harmless beyond a reasonable doubt. . . . If it was not, reversal is required."). "An alleged error is harmless if the appellate court determines beyond a reasonable doubt that the alleged error did not contribute to the verdict." Wells v. Halyard, 341 S.C. 234, 533 S.E.2d 341 (Ct. App. 2000) (citing State v. Kerr, 330 S.C. 132, 498 S.E.2d 212 (Ct. App. 1998)). As noted above, the admission of the confession was crucial to the jury verdict. Without the confession, the State's evidence included testimony from Victim, who had extensive head trauma and whose testimony was not born out by the forensic evidence, and Jenkins' assumptions. There is no physical evidence linking Appellant to the crime. Further, the inconclusiveness of the State's witnesses' testimony, without the confessions, leaves a large cavity of reasonable doubt as to Appellant's guilt.

CONCLUSION

Based on the foregoing, Appellant respectfully requests this Court grant his Petition for Rehearing and determine that the trial court erred in finding that the record was sufficient for Appellate review and grant Appellant a new trial. In the alternative, Appellant respectfully requests this Court grant his Petition for Rehearing and find that the trial court erred in admitting the confessions and that such confessions were not harmless error, entitling Appellant to a reversal of his convictions.

[Signature page to follow]

Respectfully submitted



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vs.

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CERTIFICATE OF SERVICE

I, the undersigned, an employee of Richardson Plowden & Robinson, P.A., attorneys for Darius Ransom Williams, do hereby certify that I have this date served the foregoing **Petition for Rehearing** by personally depositing a copy of the same in a United States Postal Service mailbox, postage prepaid, addressed to the following:

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Salley W. Elliott, Esquire
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Sonya Hancock

January 29, 2016

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January 29, 2016

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Re: The State, Respondent vs. Darius Ransom-Williams, Appellant
Trial Case No.: 2011GS3800114, 2011GS3800124
Appellate Case No.: 2012-212566
RPR File No.: 095-559

Dear Ms. Allen:

As counsel for Appellant Darius Ransom-Williams, I have enclosed for filing an original and six (6) copies of a **Petition for Rehearing** in the above-referenced matter, along with our original Certificate of Service. I have also enclosed one additional copy of our Petition for Rehearing and would request that it be file-stamped and returned to our courier.

With kind regards, I am

Sincerely,



Sheila M. Bias
S.C. Bar # 100005

SMB/smh
Enclosure

cc: David Spencer, Senior Assistant Attorney General (with enclosure)
Salley W. Elliott, Assistant Attorney General (with enclosure)
Robert M. Dudek, Esquire (with enclosure)

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