

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Roger L. Couch, Circuit Court Judge

RECEIVED

NOV 20 2015

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

DOMINIQUE M. ROSS,

APPELLANT

APPELLATE CASE NO. 2014-000958

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES..... 2

STATEMENT OF ISSUE ON APPEAL 3

STATEMENT OF THE CASE 4

STATEMENT OF FACTS 5

ARGUMENT 14

CONCLUSION..... 18

TABLE OF AUTHORITIES

Cases

State v. Martin, 403 S.C. 19, 742 S.E.2d 42 (Ct. App. 2013)..... 12, 15, 16

State v. McDowell, 266 S.C. 508, 224 S.E.2d 889 (1976)..... 14

State v. Morris, 289 S.C. 294, 345 S.E.2d 477 (1986)..... 16

State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006)..... 14, 16

States v. Beahm, 664 F.2d 414 (4th Cir.1981)..... 14

STATEMENT OF ISSUE ON APPEAL

Did the trial court err in allowing the state to argue flight as evidence of guilt when Appellant Ross left for north Carolina about one to two weeks after the incident because her family were in North Carolina; Ross did not know law enforcement were seeking her; and law enforcement testified that they did not obtain an arrest warrant for Ross until one and one-half months after the incident as she was considered to be a victim initially?

STATEMENT OF THE CASE

On July 18, 2012, the Richland County Grand Jury indicted Dominique M. Ross on the charges of attempted murder, armed robbery, and burglary first degree. On April 21- 24, 2014, Ross proceeded to trial before the Honorable Roger L. Couch and a jury. Ross was represented Craig Stanley and Chris Leonard. The state was represented by Kathryn "Luck" Campbell and Meghan Walker. The jury returned a verdict of guilty on the armed robbery and burglary first degree, and not guilty on the attempted murder. R. 577, ll. 1 – 19. Judge Couch sentenced Ross to fifteen years on the burglary first and ten years on the armed robbery to run concurrent to each other. R. 579, ll. 12 – 22. Ross's attorney filed a notice of appeal. This appeal follows.

STATEMENT OF FACTS

Dominique Ross came to Columbia in 2010 when her father was transferred to Fort Jackson. Her family moved from Goldsboro, North Carolina. She attended Richland Northeast High School where she met Amber Richardson. After high school, she and Amber became lovers and moved into an apartment with another couple. R. 417, ll. 5 – R. 418, l. 25.

Jamie Sherman testified that he owned a local car wash. He and Ross were good friends and their relationship had become sexual after about two months. He kept her dog for her. She knew where he kept his money in his house. His description of the incident was that they had planned to get together on Saturday originally but changed it to Sunday, January 8, 2012. When Ross arrived, they went into his house. Ross was persistent in telling him to take his shower. Jamie's habit was to turn the shower on and then brush his teeth before he got in the shower. After he turned the shower on and before he got in, he saw Ross run past the bathroom door so he stuck his head out to see what was happening. He saw her open the front door and three men walked in. R.113, ll. 1 – R.122, ll. 7.

The men started walking toward him so he shut the bathroom door. He had seen one of the men before when Ross brought him to the carwash and said he was her uncle. The men tried to get into the bathroom, but Jamie was holding the door closed. The men then shot through the door and hit him in the eye. He lost that eye as a result. Jamie fell to the floor and the men shot him two more times. One shot went through his thumb and the other through his arm. He told them the cash was in a box in his bedroom. Then he pretended to be dead as he feared they were going to kill him. The men left. R.122, ll. 4 – R.124, ll. 25.

When the men first came in, Ross ran through the kitchen and went into the backyard. When the men left, she returned to the house. Ross apparently thought he was dead as she stepped over him and went into the bedroom. She began plundering through the house. Finally, Jamie was able to get up and walked into the kitchen. He asked her to call 911 and she pretended to call. When he asked her again, she did call 911. Jamie stayed in the hospital three days and never heard from Ross again. Approximately \$880 was taken in the box. R. 124, ll. 12 – R. 127, ll.19.

Jamie made a statement to police on January 17, 2012. On cross examination, he admitted that he had told the police to find out who did this to him and arrest the. He made no mention of Ross running by the bathroom door nor of her stepping over him. He gave a second statement about a month later on February 16, 2012. He was frustrated at that point because nothing was being done on his case. He included in that statement the information about Ross running by the bathroom door and stepping over him. R. 162, ll. 18 – R. 173, ll. 7.

Amber Richardson testified that she and Ross had been girlfriends about two to three months when this incident happened. Ross's family lived in North Carolina. On January 8, 2012, Ross's two uncles came to town from North Carolina. The two men and Ross met at their apartment and planned the robbery of Jamie. Ross asked Amber to drive the men to Jamie's house that night. Amber was to drive Ross to the house, and return and get the two men and drive them to Jamie's. Amber waited in the car in the parking lot next door. She heard a gunshot and the men returned to the car. One of them had a box. One of the men got in a car behind Amber and one rode with her. She drove them back to the apartment, and the

men left immediately. Later, the police dropped Ross at the apartment. R. 57, ll. 8 – R. 75, ll. 25.

They stayed at the apartment for about a week after the incident. Ross got a small amount of money from the robbery. Then they went to North Carolina to stay with Ross's aunt. They were scared they would get caught by the police. One of the men was married to that aunt as Amber saw him there. Amber stayed in North Carolina about a week and a half when she returned to her parents' home in Columbia. Ross stayed at her aunt's. R. 69, ll. 1 – R. 71, ll. 20.

Amber did not go to the police but the police located her in March. She met with the investigators and told them what happened. She was arrested and charged with armed robbery and attempted murder. Her charges were still pending at trial although she testified she had not been promised anything to testify. R. 71, ll. 21 – R. 76, ll. 25.

Trevor Holt was a crime scene investigator with the Richland County Sheriff's Department. He responded to the incident location and Ross was still there. He took a DNA swab of Ross's shoulder. R. 183, ll. 1 – R. 189, ll. 19.

Investigator Robert Martin was assigned to the case and tried to talk to Jamie while he was still in the hospital, but was told he was unable to give a statement then. Then Jamie called him for an appointment to talk. Captain McDonald took Jamie's statement in January 2012. At that point, he had not made contact with Ross. He did not know where she was. Jamie gave him Ross's phone number and he obtained her phone records. R. 249, ll. 10 – R. 254, ll. 23.

Jamie was interviewed a second time on February 16, 2012. Martin agreed that Jamie was frustrated about his case but it took longer to track people down when people

“fled or attempted to hide or run.” The police had no contact with Ross for the month and a half. They were not able to find her. He was then assigned to another case. R. 255, ll. 1 – R. 259, ll. 21.

On cross examination, Investigator Martin admitted that he did not know if Ross had any knowledge that law enforcement was looking for her. He also admitted that they did not try to reach out and contact Ross after they had her phone number. She looked more like a suspect at that point. R. 265, ll. 11 – R. 266, ll. 25.

Captain Scott McDonald with the Richland County Sheriff’s Department, was the lead investigator at the beginning of this investigation. He talked to Jamie on the telephone on January 13, 2012 for his version of the events. At that point, Ross appeared to be a victim. Ross gave a statement to police the night of the incident that a person named Amp was involved. When Jamie came in on January 17 to give a statement, he explained that Dion Dotson, the former girlfriend of Ross, talked to Jamie in the hospital and Jamie’s view of Ross changed then. Jamie provided them with Ross’s cell phone number for them to obtain her records. R. 277, ll. 15 –R. 282, ll. 4.

After Captain McDonald talked with Jamie and the information he obtained from Dion Dotson, and after reviewing the cell phone records, Ross went from victim to suspect. R. 324, ll. 16 – R. 324, ll. 25.

Investigator David Unger with the Richland County Sheriff’s Department took over as lead investigator from Captain McDonald in February, about a month and a half after the incident. After reviewing the records, he decided there was probable cause to arrest Ross. He obtained an arrest warrant then, and she was arrested in Raleigh, North Carolina February 27, 2012. He obtained the name of Amber through the cell phone records and her

address. He interviewed Amber on March 8, 2012. As a result, they developed the two male suspects. An arrest warrant for Amber was obtained on March 19, 2012. R. 269, ll. 9 – R. 384, ll. 16.

Investigator Unger had no knowledge that Ross knew they were looking for her. R. 397, ll. 1 – 24.

Ross testimony was that she met Jamie Sherman, the victim, through her former girlfriend, Dion Dotson. Jamie owned a carwash and sold CDs. Ross became friends with Jamie and bought a pit bull puppy from him. Eventually, her apartment manager said the dog could not stay at the apartments. Ross gave the dog back to Jamie to keep temporarily. Ross would go to Jamie's house about three times a week to take care of the dog. Amber had a car and would drive Ross to Jamie's. R. 419, ll. 1 – R. 423, ll. 24.

Ross and Jamie had made plans for her to go to Jamie's on Sunday, January 8, 2012 for Ross to review some counterfeit DVDs to see which ones were okay for Jamie to copy and sell at his carwash. Ross had worked for Jamie at times washing cars and supervising other people when Jamie was not there. R. 423, ll. 25 – R. 427, ll. 25.

Amber drove her to Jamie's around eight-twenty on January 8, 2012, and dropped her off. Ross was going through the DVDs, and Jamie went to take a shower. Ross heard a knock at the door and told Jamie through the bathroom door that someone was knocking. Jamie told her to answer it. Ross unlocked the door after the person said it was Amp whom Ross knew. R. 431, ll. 22 – R. 438, ll. 25.

Two men rushed into the house and threw her to the ground and said they would kill her if she moved. She lay on the floor and could not see anything. The second man left her and went to the bathroom where Jamie was. She heard the bathroom door opening and

closing as though they were fighting over it. The second man left her and went to the bathroom. Ross then heard one gunshot. She heard them tell Jamie to “give it up.” Jamie said okay. Then the two men run past her through the front door. She quickly locked the front door. R. 439, ll. 1.– R. 441, ll. 21.

She proceeded to find Jamie who was coming out of his bedroom. He was holding his eye which was bleeding. She put a towel over his head and called 911 because Jamie had been shot. R. 441, ll. 21 – R. 443, ll. 20. She talked to the police after the ambulance took Jamie to the hospital. The police swabbed her arm for DNA because she told them one of the men grabbed her arm. The police drove her to her former girlfriend’s house, Dion, because Dion showed up there immediately after the incident. Dion then took her to Ross’s apartment. The next day, Dion took Ross to the hospital to see Jamie but she was not allowed to see him. R. 443, ll. 21 – R. 447, ll. 11.

Ross was traumatized by the incident and did miss several days of class at ITT Tech. She talked to her parents about the incident because she was scared and traumatized. All of her family were then in North Carolina as she had no family in Columbia. About two weeks after the incident, she and Amber moved to North Carolina to be near her family. Ross moved in with her aunt because her aunt lived near a school where Ross hoped to attend, and she had lived with her aunt once before. She was not fleeing from the police as her official government identification listed her address as North Carolina. She also had her same cell phone that she had on January 8, 2012. Amber soon returned to Columbia. R. 447, ll. 12 – R. 450, ll. 22.

The police appeared at her aunt's house in North Carolina one day and arrested her. Ross denied planning with her two uncles to rob Jamie and shoot him. R. 449, ll. 22 – R. 452, ll. 14.

In a pretrial motion, defense counsel made a motion to suppress any evidence of flight by Ross. He argued that the event occurred on January 8, 2012. It was a home invasion, and Ross was inside the home at the time. Initially, Ross was believed by the police to be a victim. The police took a DNA swab from her. The victim, Jamie Sherman, said during his stay at the hospital that Ross was not involved. Then, in his statement to police on January 17, 2012, nine days later, the victim changed his story and began to implicate Ross as a perpetrator. The police made no contact with Ross during this time. R. 5, ll. 12 - R. 6, ll. 25.

Around January 20-21, 2012, Ross returned to North Carolina where her mother and extended family lived. This was a stressful time for her so she moved to be near family. The arrest warrant was not issued until February 21, 2012. Counsel moved to suppress any talk of Ross going to North Carolina because it was unduly prejudicial and there was no nexus between Ross fleeing and the offenses with which she was charged. R. 7, ll. 1 – 25.

The state argued that Amber Richardson, the girlfriend of Ross and a co-defendant, was going to provide the nexus. She was going to testify that there was a connection between the incident and their going to North Carolina. Defense counsel countered that the nexus had to be that Ross was leaving because she knew she was being investigated. She did not know of any investigation when she left, and the state had to prove she knew. The judge decided that his ruling depended on Amber's testimony. He decided they could proffer the testimony of Amber and he would make his decision then. R. 8, ll. 1 – R. 12, ll. 25.

During her proffer, Amber Richardson testified that she and Ross were girlfriends and were living together at the time of this incident on January 8, 2012. She knew what was happening on January 8 as far as the incident. After the events, they continued living at their apartment in Columbia, and then went to North Carolina because Ross's family was there. She said they left "to avoid the cops and stuff." Amber stayed in North Carolina only about a week and a half. Ross stayed. R. 23, ll. 15 – R. 26, ll. 23.

On cross examination, Amber testified that they did not know of any investigation of the incident with Jamie as they did not talk to the police before they left. They did not leave because the police were after them, but they were just nervous. They stayed with Ross's family. R. 27, ll. 9 – R. 30, ll. 25.

Defense counsel cited State v. Martin, 403 S.C. 19, 742 S.E.2d 42 (Ct. App. 2013) in his argument to the court that there had to be inference that the defendant had knowledge they were being sought by the authorities. It was not immediate flight as they waited over a week. Ross nor Amber had any knowledge that the police were after them. The police did not seek an arrest warrant for over a month. The state had not proven that Ross's leaving was motivated by the police seeking them. R. 31, ll. 9 – R. 32, ll. 12.

The trial judge ruled that the testimony was that Ross and Amber "assumed" the police were pursuing them. He stated that flight evidence applied to other forms of evasive conduct other than flight. Here, they crossed state lines and left the area because they thought the police were going to investigate them. The judge allowed the state to argue flight in their opening and defense counsel could challenge it later once the case was being tried. R. 32, ll. 11 – 24.

Amber testified before the jury about the incident and her pending charges of armed robbery and attempted murder. She told the jury that after the incident, she and Ross stayed in Columbia about a week and then went to North Carolina to Ross's family. They left because they were scared they would "get caught by the cops." R. 69, ll. 1 – R. 76, ll. 25.

During her closing argument, the solicitor argued to the jury:

Guilt beyond a reasonable doubt? I beg you, all the state is asking is to hold Dominique Ross responsible. She fled. She tried to get away.

R. 536, ll. 1 – 3.

The defense counsel argued in his closing :

So let's talk about flight. Okay. The police during that whole month period never call. Never call Dominique Ross. Okay. Yes. She is a suspect. So don't call her.

R. 546, ll. 1 – 25.

Counsel continued to argue that the police did not look for her at any of the places she might be. They did not ask Dion Dotson about Ross. Ross had experienced a traumatic event. She wanted to be with her family. The police found her quickly. R. 546, ll. 13 – 25.

Following the verdict as part of post-trial motions, defense counsel renewed his pretrial motions along with all other motions. He also asked for a new trial. R. 578, ll. 1 –

16.

ARGUMENT

The trial court erred in allowing the state to argue flight as evidence of guilt when Appellant Ross left for North Carolina about one week to two weeks after the incident because her family were in North Carolina; Ross did not know law enforcement were seeking her; and law enforcement testified that they did not obtain an arrest warrant for Ross until one and one-half months after the incident as she was considered to be a victim initially.

As a general rule, any guilty act, conduct or statements on the part of the accused are admissible as some evidence of consciousness of guilt. State v. McDowell, 266 S.C. 508, 224 S.E.2d 889 (1976).

In State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006), the Supreme Court held that flight from prosecution was admissible as evidence of guilt. However, the Court held the evidence was relevant when there was a nexus between the flight and the offense charged. The Court wrote that “the critical factor to the admissibility of evidence of flight is whether the totality of the evidence created an inference that the defendant had knowledge that he was being sought by the authorities, and his actions were motivated by his belief that police officers were aware of his wrongdoing and were seeking him for that purpose.” The Supreme Court held in Pagan that the defendant’s failure to stop for a blue light was not evidence of flight in his murder trial because the evidence did not create the inference that the defendant’s failure to stop was motivated by his belief that the pursuing officer was seeking him for his pending murder charge.

The Fourth Circuit held in States v. Beahm, 664 F.2d 414 (4th Cir.1981), that evidence of flight was inadmissible where a defendant flees after the commencement of an investigation unrelated to the crime charged, or of which the defendant was unaware. Beahm’s flight occurred three weeks after the crime but on the same day that he received a note from the FBI agent

requesting Beahm to contact him. The Fourth Circuit reversed “based on the government’s failure to substantiate adequately the inference that Beahm was aware he was wanted for the crime.” There was no evidence that Beahm knew he was aware that he was the subject of a criminal investigation.

In State v. Martin, 403 S.C. 19, 742 S.E.2d 42 (Ct. App. 2013), the Court of Appeals held the evidence that the defendant gave the arresting officer false identifying information was inadmissible as evidence of flight in absence of a nexus between the false information and the bank robbery which occurred more than a year earlier. However, the Court found the admission was harmless. Martin was wanted in connection with a bank robbery that occurred on April 23, 2009 in Aiken. Nearly a year later, Martin was found in Georgia and gave false information to the officer. The court of Appeals found no nexus existed between the bank robbery and Martin providing false information because the officer gave no reason for stopping Martin; the police had not contacted him previously; and Martin had not been warned that he was under investigation; and he had not made any statements to others about being sought for a bank robbery.

Although in Martin’s case, the Court of Appeals found the error to be harmless, Martin is distinguished from Ross in that there were three co-defendants in Martin’s case that Martin was the master mind and gunman. Eyewitnesses provided a description of Martin’s attire and money bag that matched the description given by the three co-defendants. Also, a disinterested witness testified that he gave a black pellet gun to Martin the night before the robbery. Therefore, the testimony of officer Poythress from Georgia regarding the false information Martin gave him had no effect on the verdict.

In State v. Pagan, *supra*, the Supreme Court found the error to be harmless because an eyewitness testified she saw Pagan beat the murder victim to death with a board. Another witness saw the victim with Pagan the night of the murder and saw Pagan running from someone screaming.

Ross is distinguished from both Martin, *supra*, and Pagan, *supra*, because there was not overwhelming evidence of guilt. It was simply Ross's word against that of her co-defendant, Amber. Amber wanted to help herself with her sentence. Jamie Sherman believed Ross was a victim also until he believed the word of Dion Dotson, Ross's former lover. The solicitor argued in her closing several times that this case "boiled down to credibility." R. 514, ll. 6 – 25; R. 533, ll. 23 - 25.

In State v. Morris, 289 S.C. 294, 345 S.E.2d 477 (1986), the Supreme Court held that the error in the admission of defendant's prior bookmaking conviction for impeachment purposes was not harmless in his assault and battery trial in which defendant's credibility was of paramount importance. The evidence was limited to the testimony of the two girls that Morris was accused of trying to sexually assault and Morris. The Court wrote that under these circumstances, Morris's credibility was of paramount importance.

The trial court erred in allowing any evidence that Ross went to North Carolina a week or two after the incident to be admitted into evidence at the trial. There was no evidence that Ross knew she was being investigated. She talked to police on the night of the incident, and Captain McDonald testified she was believed to be a victim in the beginning. The police had her cell phone number early from the victim but did not call her or try to contact her. Her government identification listed her residence as North Carolina. The police were not seeking her when she left for North Carolina.

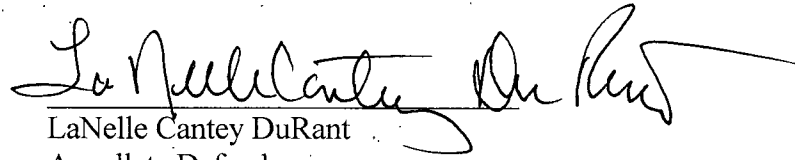
The trial judge's ruling was based on the possibility that Ross and Amber **assumed** the police were seeking them. However, the law is clear that the defendant had to have knowledge the police were seeking them.

The only evidence that Ross left because of the police was Amber's testimony that they were nervous about the police. Ross had not talked to them and had not been made aware that she was under investigation. Amber was biased and wanted to help herself because she had the charges of armed robbery and attempted murder which were still pending when she testified. Amber did not testify that Ross told her she was going to North Carolina because she was afraid of the police. Ross was going to be near her family as she had been through a very stressful and traumatic event. An arrest warrant was not even obtained until almost six weeks after the incident.

CONCLUSION

Based on the above, Ross's convictions and sentences should be reversed and her case remanded for a new trial.

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 20th day of November, 2015.

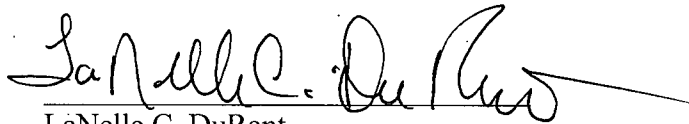
CERTIFICATE OF COUNSEL FOR APPELLANTS

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The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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November 20, 2015



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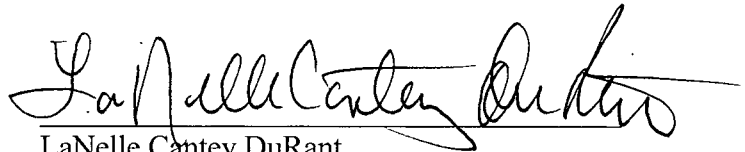
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CERTIFICATE OF SERVICE

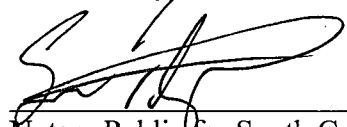
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Mark R. Farthing, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 20th day of November, 2015.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 20th day of November, 2015.



(L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.