STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of General Sessions

The Honorable D. Craig Brown, Circuit Court Judge

Appellate Case No. 2015-001042

The State, ...Respondent,

v.

Antwan J. Jett,.....Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

1. The trial judge did not err in admitting Appellant's recorded statement to Investigator Jones.

STATEMENT OF THE CASE

Appellant was indicted at the April 2014 term of the Florence County Grand Jury for first-degree burglary (2014-GS-21-0525, count 1), assault with intent to commit first-degree criminal sexual conduct (2014-GS-21-0525, count 2), possession of a weapon during the commission of a violent crime (2014-GS-21-0525, count 3), two counts of armed robbery (2014-GS-21-0525, counts 4 and 5), and criminal conspiracy (2014-GS-21-0525, count 6). (Indictments). Deputy Solicitor John C. Jepertinger, Esquire represented the State and Assistant Public Defender W. Vickery Meetze, Esquire represented Appellant.

The State called the case to trial on the following charges: first-degree burglary, possession of a weapon during commission of a violent crime, one count of armed robbery, and criminal conspiracy. (Tr. p. 7). The jury found Appellant guilty. (Tr. p. 333). On April 20, 2015, the Honorable D. Craig Brown sentenced Appellant to concurrent terms of thirty (30) years for first-degree burglary, time-served for possession of a weapon during commission of a violent crime, twenty-five (25) years for armed robbery, and five (5) years for criminal conspiracy. (Tr. pp. 341-42; Sentencing sheets).

STATEMENT OF FACTS

Pre-trial hearing

At a pre-trial Jackson v. Denno[1] hearing, Corporal Legrande Gowdy of the Florence Police Department testified he responded to "a possible home invasion" on December 31, 2013. (Tr. pp. 41-42). Gowdy found Appellant one-half block away from the scene "[u]p under a car." (Tr. pp. 42-44). When Appellant refused Gowdy's order to stop backing up under the car, Gowdy tased Appellant and then read his Miranda[2] rights. (Tr. pp. 44-46). While he was being Mirandized, Appellant stated he "didn't know anything about a gun" and Gowdy stopped questioning him while an investigator was called to the scene. (Tr. pp. 46-47; pp.48-49). Gowdy said that, after Appellant was Mirandized, he made two more statements: (1) about the clothes he was wearing that night and (2) that "he had been out drinking and was tired, he crawled up under the car to go to sleep." (Tr. pp. 47-49).

Investigator Felicia Jones responded to the intersection and spoke with Gowdy about "the evidence that was dropped along the way." (Tr. pp. 50-51). Jones used Gowdy's voice recorder for her meeting and interview with Appellant. (Tr. p. 51). Jones read Appellant his Miranda rights and recorded their subsequent conversation – which was played for the trial judge.[3] (Tr. pp. 51-52).

The trial judge found Appellant's statements were admissible. The trial judge concluded Appellant's statement to Gowdy was "freely and voluntarily given, knowingly and intelligently

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[1] Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774 (1964).
[2] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966).
[3] Though the court reporter did not transcribe the content of this audiotaped interview in the trial transcript, it appears from the attorneys' arguments that Appellant said "where's my lawyer." (Tr. pp. 52-55).

done so without force, pressure, or intimidation" while his Miranda warnings were being read. (Tr. p.57). Regarding Appellant's statement to Jones, the trial judge noted Appellant had been read Miranda warnings twice. The trial judge also noted "prior case law has stated ambiguous invocation of right to an attorney would allow such statements to be admitted." (Tr. p. 58). The trial judge found it is not required for law enforcement to "inquire further as to the defendant requesting the defendant clarify" and concluded Appellant's rights were read to him but he continued to talk. (Tr. pp. 57-58).

Trial

Michael Barr was woken by a knock at his door at approximately 3:30 a.m. on December 31, 2013. (Tr. pp. 83-85). When he opened the door "[t]hree people with hoodies on tied across their face came in," assaulted him, and demanded money. (Tr. pp. 85-86). Barr stated the three men were African American and gave general descriptions of their height, weight, skin color, and clothing. (Tr. pp. 87-92). Barr said the man wearing the green hoodie put "a small Derringer" in his face. (Tr. pp. 86-87; p.93). Barr said one of the men picked up his hunting knife. (Tr. pp. 96-97). Barr said the three men eventually ran out the back door. (Tr. p. 88; p.99). Barr said pill bottles were missing from his room. (Tr. p.96).

Officer William Blackmon responded to the scene and saw two suspects running away, one of whom was wearing a green hoodie. (Tr. pp. 138-39). Though Blackmon gave chase, he did not apprehend anyone. (Tr. pp. 139-41). Blackmon retraced the path he had taken and found a hunting knife on the ground. (Tr. pp. 142-43).

Officer Thomas Herman, Jr. responded to the scene for "a possible home invasion." (Tr. pp. 123-24). As he arrived, he saw "two subjects running" (one of whom was wearing a "green

or gray" hoodie) and Officer Blackmon in a foot chase with them. (Tr. pp. 125-26; pp.134-35). Herman did not apprehend anyone but walked along their probable path and found "a small caliber handgun, a small revolver style Derringer." (Tr. pp. 126-30; p.135).

Officer Lacey Allen and Corporal Legrande Gowdy also responded to the scene (after Herman and Blackmon chased the potential suspects). (Tr. pp. 146-48; pp.187-88). Allen and Gowdy found pill bottles, a green hoodie, a gray pullover,[4] mask, and hat that "matched the description of the one that the suspect was wearing." (Tr. pp.148-51; p.155; pp.189-90; p.199). Allen then noticed someone was lying underneath a car. (Tr. pp. 150-51). Allen drew her weapon and ordered the individual to get out from under the car. Though the individual began to move from under the car, he hesitated when Gowdy appeared. (Tr. p. 152; pp.191-92; pp.209-10). Gowdy told the individual – whom he identified in court as Appellant – to get out from under the car. When Appellant did not do so, Gowdy tased him and Appellant was handcuffed.[5] (Tr. p. 153; pp.192-93). While Gowdy was reading Appellant his Miranda rights, Appellant said "I don't know anything about that gun." (Tr. pp. 193-94).

Corporal Felicia Jones – who was an investigator at the time – met with Appellant while he was detained in the back of a patrol vehicle. (Tr. pp. 237-38). Jones borrowed Gowdy's voice recorder for this conversation then read Appellant his Miranda warnings and questioned him about the incident. (Tr. pp. 238-39). The recording was published to the jury. (Tr. pp. 239-40). Jones stated Appellant was arrested after he had given his statement because his story (that he simply fell asleep under that car) was implausible. (Tr. pp. 244-45).

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[4] A SLED forensic scientist identified Appellant's DNA on the gray sweatshirt. (Tr. p. 173; p.179).
[5] Appellant was wearing a t-shirt and gloves when he was arrested, though it was December 31st and very cold that night. (Tr. pp. 153-54; pp.206-07).

ARGUMENT

The trial judge did not err in admitting Appellant's recorded statement to Investigator Jones.

Appellant argues the trial judge erred in admitting his recorded statement to Investigator Jones because he "unambiguously asked for his lawyer initially when he said: 'Where is my lawyer?' and Investigator Jones continued to question him." (Initial Brief of Appellant, p. 10). Appellant argues this was a violation of Miranda v. Arizona. (Initial Brief of Appellant, pp. 10-12).[6] Appellant's argument is without merit.

In criminal cases, the appellate court reviews errors of law only and is bound by the trial judge's factual findings unless they are clearly erroneous. See State v. Edwards, 384 S.C. 504, 508, 682 S.E.2d 820, 822 (2009). The appellate court is limited to determining whether the trial judge abused its discretion. See id.; see also State v. Johnson, 413 S.C. 458, 466, 776 S.E.2d 367, 371 (2015) ("The admission or exclusion of evidence rests in the sound discretion of the trial judge, and will not be reversed on appeal absent an abuse of discretion.") (citation omitted). An abuse of discretion occurs when the trial judge's decision is unsupported by the evidence or controlled by an error of law. State v. Black, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012). "This Court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence." State v. Edwards, 384 S.C. at 508, 682 S.E.2d at 822 (citing State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001)).

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[6] Respondent notes Appellant's sole issue on appeal challenges his recorded statement to Investigator Jones. As such, Appellant's statements to Corporal Gowdy are uncontroverted and law of the case. Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("An unappealed ruling is the law of the case and requires affirmance.").

The South Carolina Supreme Court has found that, when analyzing a criminal defendant's invocation of their right to counsel, the trial judge makes two separate inquiries. State v. Johnson, 413 S.C. at 466-67, 776 S.E.2d at 371. First, the trial judge must determine whether the accused invoked their right to counsel. See Smith v. Illinois, 469 U.S. 91, 95, 105 S. Ct. 490, 492-93 (1984) (quoting Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 1884-85 (1994) (whether accused "expressed his desire" for, or "clearly asserted" his right to, the assistance of counsel); Miranda, 384 U.S. at 444-45, 86 S. Ct. at 1612 (whether accused "indicate[d] in any manner and at any stage of the process that he wish[ed] to consult with an attorney before speaking")). Second, if the accused did invoke their right to counsel, the trial judge may admit their responses to further questioning only after finding both that he initiated further discussions with law enforcement and knowingly and intelligently waived the right they previously invoked. See Edwards v. Arizona, 451 U.S. at 485-86 n.9, 101 S. Ct. at 1885 n.9.

The trial judge did not err in admitting Appellant's recorded statement to Investigator Jones into evidence. With regard to the first consideration in Johnson, the trial judge properly concluded Appellant did not invoke his right to counsel. The South Carolina Supreme Court's analysis in State v. Wannamaker, 346 S.C. 495, 552 S.E.2d 284 (2001) is instructive on this issue. In Wannamaker, the defendant was advised of her rights and then "requested to speak to either a lawyer or her mother." Id. at 498, 552 S.E.2d at 286. The defendant eventually spoke with her mother, was re-advised of her rights, and then gave a statement. Id. at 498-99, 552 S.E.2d at 286. The Supreme Court held the defendant's statement "was not an unambiguous invocation of her Fifth Amendment right to have counsel present during interrogation" and concluded the request was ambiguous. Id. at 499-500, 552 S.E.2d at 286-87.

Similarly, Appellant's statement "where's my lawyer" was ambiguous. Police officers are not required to cease questioning a suspect unless a request for counsel is unambiguous. Davis v. United States, 512 U.S. 452, 461-62, 114 S. Ct. 2350, 2356 (1994); cf. State v. Kennedy, 333 S.C. 426, 430, 510 S.E.2d 714, 715 (1998) ("If the desire for counsel is presented sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney, no ambiguity or equivocation exists, and all questioning must cease until the person can consult counsel or the accused voluntarily reinitiates conversation.") (quotation omitted). Appellant was twice given Miranda warnings (by both Corporal Gowdy and Investigator Jones) and continued to speak to police without invocation of his right to counsel. Appellant did not ask to speak to an attorney. Appellant did not state he would not speak to police without an attorney present. Appellant did not state he wished for an attorney to be present before the matter proceeded any further. Appellant merely made the vague statement "where's my lawyer" and did not expand upon this any further before continuing to talk to police. It was unnecessary for Investigator Jones to make further inquiries and ask Appellant to clarify his ambiguous statement. As such, the trial judge did not abuse his discretion in determining Appellant's comment was an ambiguous invocation of the right to counsel and, therefore, that his statements to Jones were admissible at trial.[7]

Accordingly, Appellant's statement "where's my lawyer" was not an unambiguous invocation of counsel or request for an attorney that would have mandated the cessation of all questioning by law enforcement in this case. As a result, the trial judge did not abuse his

[7] As the trial judge properly found Appellant did not invoke his right to counsel, the second consideration in Johnson is not relevant.

discretion in admitting Appellant's recorded statement to Investigator Jones into evidence at trial and this Court must affirm.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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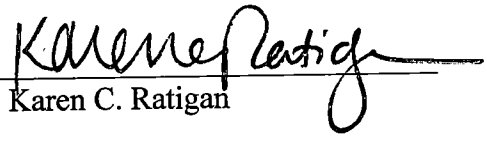
By: 
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June 30, 2016

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DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

In addition to the matter designated by Appellant, Respondent proposes the following should be included in the Record on Appeal:

1. **Trial transcript pages 96-97, 99, 134-35, 142-43, 153-55, 209-10.**

The undersigned hereby certifies this Designation contains no matter which is irrelevant to this appeal.

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