

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED

Appeal from Beaufort County

MAY 03 2016

Carmen T. Mullen, Circuit Court Judge

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

TERRANCE SEABROOK,

APPELLANT

APPELLATE CASE NO. 2015-001495

FINAL BRIEF OF APPELLANT

LARA M. CAUDY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS..... 1

TABLE OF AUTHORITIES 2

STATEMENT OF ISSUE ON APPEAL..... 3

STATEMENT OF THE CASE..... 4

STATEMENT OF THE FACTS..... 7

ARGUMENT 13

CONCLUSION 30

TABLE OF AUTHORITIES

Cases

<u>In re D.W.</u> , 171 N.C.App. 496, 615 S.E.2d 90 (2005)	27
<u>Jackson v. Denno</u> , 378 U.S. 368 (1964)	passim
<u>Koon v. State</u> , 358 S.C. 359, 595 S.E.2d 456 (2004).....	27
<u>Miranda v. Arizona</u> , 384 U.S. 436 (1966)	passim
<u>Smith v. State</u> , 291 Md. 125, 433 A.2d 1143 (1981)	27
<u>State v. Chanze</u> , 211 W.Va. 257, 565 S.E.2d. 379 (2002)	27
<u>State v. Gentry</u> , 363 S.C. 93, 610 S.E.2d 494 (2005).....	27
<u>State v. Ladson</u> , 373 S.C. 320, 644 S.E.2d 271 (Ct. App. 2007).....	26, 27, 28
<u>Whitehead v. State</u> , 352 S.C. 215, 574 S.E.2d 200 (2002).....	27

Other Authorities

S.C. Code Ann. § 17-25-45(A)	4
------------------------------------	---

Rules

Rule 403, SCRE.....	19, 21
Rule 801(d)(2), SCRE.....	19, 25

STATEMENT OF ISSUE ON APPEAL

Whether the court erred by finding the record of Appellant's trial had been sufficiently reconstructed to allow for meaningful appellate review given this state's strict issue preservation rules where the specific objections and arguments made by defense counsel pretrial and the rulings of the trial court were recalled only in summary fashion resulting in a largely conclusory reconstructed record?

STATEMENT OF THE CASE

A Beaufort County Grand Jury indicted Appellant at the December 16, 2010 term of General Sessions for armed robbery and kidnapping. R. 502. On February 3, 2012, the state filed a Notice of Intent to Seek a Life Imprisonment Sentence pursuant to S.C. Code Ann. § 17-25-45(A). R. 280, ll. 16-22. His case was called to trial on February 27, 2012 before the Honorable Roger M. Young, Sr., and a jury.¹ However, on February 28, 2012, Judge Young granted Appellant's motion for a continuance after the state unexpectedly offered his co-defendant immunity in exchange for his testimony against Appellant. R. 7, l. 23 – 8, l. 7.

Appellant's case was again called to trial on March 19, 2012 before the Honorable Carmen T. Mullen, and a jury. R. 10. Assistant Solicitor James M. Bannon represented the state, and Larry W. Weidner represented Appellant. R. 11. On March 21, 2012, the jury acquitted Appellant of kidnapping, but found him guilty of armed robbery. R. 279, ll. 17-23. Judge Mullen sentenced him to life without parole pursuant to S.C. Code Ann. § 17-25-45(A). R. 282, ll. 4-12.

On April 5, 2012, a hearing was held before Judge Mullen on Appellant's post-trial motion for a new trial. R. 284. At the conclusion of this hearing, Judge Mullen orally denied Appellant's motion. A subsequent written order was filed on April 27, 2012. R. 496.

On May 4, 2012, Appellant timely filed a Notice of Intent to Appeal. Upon receipt of the appointment to represent Appellant, the Office of Appellate Defense (OAD) requested Appellant's trial transcript. OAD received an incomplete transcript. Specifically, OAD only received the transcript of the third day of trial, March 21, 2012, which contained closing arguments, jury instructions, the verdict, and sentencing.

¹ Appellant has been unable to obtain a transcript of the proceedings that occurred on February 27, 2012 before Judge Young.

On May 2, 2014, Appellant filed a motion with this Court requesting his case be remanded to the circuit court to reconstruct the record. By order filed June 11, 2014, this Court granted Appellant's motion and remanded the case.

On January 26, 2015, a hearing was held in Beaufort County before Judge Mullen. Deborah Everett, the court reporter who was present at Appellant's trial, was subpoenaed to appear and bring all of her records and recordings from trial. Ms. Everett turned over several compact discs containing her records to the court. Judge Mullen gave these compact discs to Wanda Rowe, a certified court reporter with Court Administration. Ms. Rowe transcribed the proceedings that occurred on March 20, 2012, which included opening statements and all of the trial testimony, from the records of Deborah Everett. R. 224. However, there were numerous "inaudible" portions that appeared throughout the March 20, 2012 transcript. See R. 20-223.

Additionally, Ms. Rowe determined that she was the original court reporter who was present and recorded the *voir dire* and jury selection during Appellant's trial on the morning of March 19, 2012. Ms. Rowe also transcribed these proceedings. R. 38.

On April 15, 2015, a hearing was held in Beaufort County before Judge Mullen to reconstruct the remaining portions of Appellant's trial, which included all of the proceedings that took place on the afternoon of March 19, 2012, specifically all the pretrial motions and presumably a Jackson v. Denno² hearing.³ Assistant Solicitor Lynorr Musser represented the state, and Appellate Defender Lara M. Caudy represented Appellant.

² 378 U.S. 368 (1964).

³ There is conflicting information in the record regarding whether a Jackson v. Denno hearing was heard by Judge Young on February 27, 2012 and Judge Mullen subsequently adopted Judge Young's prior ruling or whether the Jackson v. Denno hearing was first heard by Judge Mullen on March 19, 2012. Either way, the parties attempted to reconstruct the Jackson v. Denno hearing at the April 15, 2015 hearing.

At the conclusion of the hearing, Judge Mullen ruled the record had been sufficiently reconstructed to allow for meaningful appellate review. R. 491, l. 25 – 493, l. 18. On April 23, 2015, Appellant filed a Notice of Intent to Appeal from Judge Mullen’s oral ruling. Judge Mullen subsequently filed a written order adopting her oral findings on August 12, 2015. R. 499.

This appeal follows.⁴

⁴ By order filed August 21, 2015, this Court granted Appellant’s motion to hold the appeal from his conviction and sentence in abeyance pending resolution of his appeal from the order reconstructing the record.

STATEMENT OF FACTS

The state alleged at trial that on the evening of October 4, 2010, Appellant robbed an Exxon Station⁵ located on Sea Island Parkway on St. Helena Island while armed with a handgun. R. 68, ll. 12-25.

Sean Kirkpatrick, the only employee working at the convenience store that evening, testified that while he was squatting down outside the front door of the store smoking a cigarette, a black male wearing “a Scream Halloween mask” “walked up, put a gun under [his] chin, and said to get inside.” Kirkpatrick claimed the man forced him inside the store and demanded he open the cash register. After Kirkpatrick opened the register, the man took all of the cash out of the drawer, ordered Kirkpatrick “to get face down on the ground,” and then left. Kirkpatrick said he “waited a few seconds” then got up off the floor, “flicked his cigarette outside,” which he had held throughout the robbery, and “phoned [d]ispatch to send out the police.” R. 75, ll. 6-24. However, he later clarified that he first called his boss to inform him the store had been robbed then locked the front door at his boss’s direction and called 911. R. 85, ll. 16-25.

According to Kirkpatrick, the armed robber was a black male, approximately five feet, four inches to five feet, eight inches tall with a “slender” build. R. 73, l. 24 – 74, l. 1.

Surveillance cameras at the convenience store captured the armed robbery. This footage was played for the jury. R. 76, l. 20 – 78, l. 11.

Shatike Shabazz, whose “given name” is Walter Jenkins, claimed he and Appellant went to the Exxon Station on the evening of October 4, 2010 to meet a “guy named Sub” about a telephone. Shabazz drove a blue Ford Explorer that was registered to a Shawn Boyd to the store and Appellant allegedly rode in the front passenger seat. R. 105, l. 16 – 107, l. 2. Shabazz testified that while the

⁵ The Exxon Station is also referred to as “Russ’s Store” throughout the record.

two were waiting for Sub, who never showed, he went into the store and purchased a couple of items then returned to the car. Shabazz eventually got tired of waiting for Sub and left the store in Boyd's Explorer. However, he claimed that before he left, Appellant got out of the car and decided to remain at the store, presumably to continue to wait for Sub.⁶ R. 108, l. 12 – 109, l. 8. According to Shabazz, he never saw Appellant again that evening.

Shabazz testified that he watched the recording of the armed robbery from the surveillance cameras numerous times and that, in his opinion, the armed robber was not Appellant. He explained, "The person's really not built like Terrance [Appellant]. The person had broader . . . shoulders. Terrance [Appellant] is real skinny. Terrance[']s shoulders don't sit that high." R. 121, l. 13 – 122, l. 3. While Shabazz again stated that Appellant was the individual who got out of the front passenger seat of the Ford Explorer he was driving that evening, he maintained that the man who robbed the store "[d]oesn't look like Terrance [Appellant]." R. 123, ll. 9-12. Moreover, when he was first interviewed, Shabazz also maintained that Appellant was wearing dark green pants and a "dingy" white golf shirt that evening, not a blue and white striped shirt. R. 120, ll. 17-25.

Staff Sergeant Brian Chapman of the Beaufort County Sheriff's Office interviewed Appellant shortly after his arrest on November 2, 2010. Chapman claimed he read Appellant his Miranda⁷ rights and that Appellant agreed to waive his rights and speak with Chapman. However,

⁶ The surveillance footage from the convenience store shows a blue Ford Explorer pull into the parking lot that evening. Shabazz is seen entering the store and making a purchase. Shortly after Shabazz returned to vehicle, the Ford Explorer is seen leaving the parking lot. Before the vehicle pulled away, the front seat passenger got out of the car and walked to the side of the building where the restrooms were located. This man is wearing a blue and white striped shirt, dark pants, and white shoes. He goes off camera and is never seen getting back into the Explorer before it left. The armed robber, who later appears from the side of the building, is likewise wearing a blue and white striped shirt, dark pants, and white shoes. R. 114, ll. 14-15; State's Exhibit Nos. 1-2.

⁷ Miranda v. Arizona, 384 U.S. 436 (1966).

according to Chapman, Appellant was unable to sign the waiver of rights form because his hands were handcuffed behind his back. R. 168, l. 23 – 173, l. 3. This interview was audio recorded. R. 174, ll. 14-22; See State’s Exhibit No. 28.

Appellant was also interviewed the next day, November 3, 2010, by Master Sergeant Brian Baird. Baird testified that he read Appellant his Miranda rights and that Appellant subsequently signed the waiver of rights form and agreed to talk. R. 149, l. 2 – 152, l. 12. However, shortly after the interview began, Chapman entered the room and took over the interrogation because Appellant was allegedly referring to individuals by their “street names” and Baird was unfamiliar with these names. R. 153, ll. 7-23. This second interview was audio recorded as soon as Chapman entered the room.⁸ R. 154, ll. 5-8; R. 174, ll. 5-13; See State’s Exhibit No. 29.

During both interviews, Appellant denied any involvement in the robbery, but he allegedly “changed his story multiple times” and his statements were inconsistent with each other. R. 179, l. 10 – 180, l. 14; R. 191, ll. 10-21. The audio recordings of these interviews were admitted into evidence and published to the jury over Appellant’s objection. R. 174, l. 18 – 175, l. 8; R. 178, ll. 4-21. It is unclear from the record at trial what Appellant’s objection was to the recorded statements because the court simply admitted the exhibits “[s]ubject to prior” objection without defense counsel specifying the grounds for his objection. R. 175, ll. 1-3; R. 178, ll. 13-15.

Lastly, the state presented three recorded telephone calls Appellant allegedly made to his mother and brother while he was incarcerated at the Beaufort County Detention Center awaiting trial. These recordings were admitted through the testimony of Sergeant Jeff Vortisch, an employee of the detention center, and published to the jury over Appellant’s objection. The dates of these telephone calls are February 8, 2011, March 26, 2011, and April 28, 2011. R. 208, l. 17 – 210,

⁸ The portion of the interview where Baird allegedly advised Appellant of his Miranda rights was not recorded.

l. 21; See State's Exhibit Nos. 37-38. Again, it is unclear from the record at trial what Appellant's objection was to the recorded telephone calls because the court simply admitted these exhibits "[s]ubject to prior" objection without defense counsel specifying the grounds for his objection. R. 209, ll. 12-16.

There was no physical or forensic evidence connecting Appellant to this armed robbery. The state relied solely on the surveillance footage from the convenience store and testimony of Shatike Shabazz, who claimed Appellant was the front seat passenger who got out of the blue Ford Explorer at the Exxon Station on the evening of October 4, 2010. See R. 198, ll. 10-22. Defense counsel argued during closing that Sean Kirkpatrick, the clerk at the convenience store, was involved in the armed robbery. The surveillance footage of the robbery shows the man in the "Scream Halloween mask" come around the side of the building while Kirkpatrick is outside smoking a cigarette. Kirkpatrick looked at the man, but showed no reaction. A car then pulled into the parking lot and the man in the mask retreated behind the side of the building. After these customers left, Kirkpatrick continued to smoke a cigarette outside and the man in the mask approached again from around the side of the building. Kirkpatrick showed little to no reaction to the masked man as he approached, continued to hold his cigarette throughout the entire robbery, and remained completely calm. After the armed robber left, Kirkpatrick calmly finished his cigarette before locking the door to the store and calling the police. R. 255, l. 1 – 257, l. 25; See State's Exhibit Nos. 1 and 2.

Specifically, counsel argued, "The fellow sticks him up with the gun. This is a mighty polite armed robbery because he [Kirkpatrick] holds the door for the fellow with the gun. He goes like this and he holds the door for him. You go first. No, no, no, you go ahead." Counsel later continued:

He [the armed robber] gets all the money out of the till and the clerk [Kirkpatrick] - - don't forget there's money underneath the tray. Do you see that? The clerk is the one who pulls the tray out for him - - don't forget the money there. He's [Kirkpatrick is] still smoking his cigarette and gets down on the ground. Got to make this look good. He [the robber] grabs a couple of Kools [cigarettes].

The clerk is going to finish his cigarette. He just got robbed. The guy [the robber] leaves now, and he [Kirkpatrick] picks up the phone to call law enforcement or call somebody. He finishes his cigarette. Gives his partner time to get down the road.

He's still enjoying the cigarette. Now he's going to close the [door] up and go throw his cigarette out. He calls his boss first to let him know they've been robbed. Then he got around to calling the cops.

What he's doing is he's buying time. Right?

R. 256, l. 14 - 257, l. 16.

Counsel argued that based on this evidence, at most, a larceny occurred because if Kirkpatrick was involved in the robbery or helped plan the robbery and was a participant then there could be no actual or real "threats or use of force or violence," which is an essential element of armed robbery. R. 257, ll. 18-25. Specifically, counsel argued, "If we are in cahoots, [then] you know I'm not going to do anything, and there [are] no threats or use of force or violence. What you just saw [on the recording from the surveillance cameras] was a larceny by whoever it was who just stole from the store." R. 257, ll. 22-25.

The jury ultimately acquitted Appellant of kidnapping, but found him guilty of armed robbery. R. 279, ll. 17-23. Because the state had served Appellant before trial with a notice of intent to seek a life sentence, Judge Mullen had no discretion during sentencing and sentenced

Appellant to life without parole.⁹ R. 282, ll. 4-12.

⁹ Interestingly, at the April 15, 2015 hearing, Judge Mullen mentioned her surprise that the state had served Appellant with notice of intent to seek a life sentence suggesting that she did not believe the sentence was justified. She stated, “I had no idea that the State had served him [Appellant] with life without parole . . . [T]here was no choice but to sentence him to life without parole, because they had noticed it.” However, she explained that during the trial, “Mr. Seabrook [Appellant] was just like he is now. He seems to have a very nice demeanor.” But ultimately, Judge Mullen stated that she “understand[s] his record is what it is.” R. 482, l. 9 – 483, l. 8.

ARGUMENT

The court erred by finding the record of Appellant's trial had been sufficiently reconstructed to allow for meaningful appellate review given this state's strict issue preservation rules where the specific objections and arguments made by defense counsel pretrial and the rulings of the trial court were recalled only in summary fashion resulting in a largely conclusory reconstructed record.

Reconstruction of the Jackson v. Denno Hearing

During the reconstruction hearing on April 15, 2015, Master Sergeant Brian Chapman and Master Sergeant Brian Baird, both of the Beaufort County Sheriff's Office, testified about their recollection of their testimony during the Jackson v. Denno hearing that occurred before the start of Appellant's trial in 2012. Both officers remembered very little about their *in camera* testimony, which had occurred over three years earlier, or the details of the two interviews of Appellant that occurred shortly after his arrest in 2010.

Chapman explained that his interview of Appellant on November 2, 2010 took place in the investigations office at the Beaufort County Sheriff's Office. Appellant had been placed under arrest and was in custody at the time of the interview. Chapman claimed he read Appellant his Miranda rights and "believe[d]" the assistant solicitor "would have" asked him to read the Miranda rights from the waiver form as he had read them to Appellant. He maintained that Appellant did not initial or sign the waiver of rights form because he was handcuffed. R. 303, l. 3 – 305, l. 20.

Moreover, Chapman claimed he remembered testifying that while he was speaking to Appellant during this interview, Appellant did not appear to be under the influence of any drugs or alcohol. He also stated, after reading the waiver of rights form that was marked as State's Exhibit No. 31 at trial, that Appellant had completed the twelfth grade. Chapman continued to rely on this exhibit during his testimony at the reconstruction hearing. Based on the waiver of rights form,

Chapman testified that the interview began at 1:40 pm. He also claimed that he did not make any promises or threats to Appellant before or during the interview. However, he could not recall his testimony regarding how long the interview lasted nor did he remember whether Appellant had been offered any drinks, snacks, or a bathroom break. Lastly, Chapman testified that he asked Appellant whether he would be willing to take a polygraph exam the following morning and Appellant allegedly “agreed to take a polygraph.” R. 302, l. 18 – 314, l. 18.

Regarding Appellant’s second interview on November 3, 2010, Chapman claimed he recalled testifying pretrial about the polygraph exam. According to Chapman, he testified that Master Sergeant Brian Baird administered the polygraph. However, Chapman could not recall whether he testified regarding how long it took Baird to administer the polygraph exam or the results of the exam.¹⁰

According to Chapman, he recalled testifying that after Baird administered the polygraph exam on November 3, 2010, Baird asked him to assist in interviewing Appellant. Chapman claimed he “believe[d]” Baird read Appellant his Miranda rights before Chapman entered the room, but he could not recall his testimony on this subject. R. 316, l. 13 – 317, l. 2. While he recalled testifying that the interview was audio recorded, he could not recall testifying when the recording began. R. 317, ll. 20-25. Chapman also could not recall whether he testified that Baird was present throughout the entire second interview or if at some point Baird left the room. R. 317, ll. 16-19.

Moreover, Chapman claimed he recalled defense counsel questioning him about his training in respects to interrogation and interviewing techniques. He stated, “There were various pointed

¹⁰ Judge Mullen interrupted the testimony at this stage and asked counsel, “Where, in the testimony, do you have that he [Appellant] was polygraphed?” R. 315, l. 24 – 316, l. 10. The judge was presumably referring to Chapman and Baird’s testimony before the jury on March 20, 2012. However, there was no mention to a polygraph before the jury. The judge’s question is significant because it indicates that she did not recall any pretrial testimony during the Jackson v. Denno hearing regarding the polygraph exam.

questions that Mr. Weidner [defense counsel] . . . asked me, in regards to specific techniques. So, I would've answered whatever the specific question was he was talking about." R. 318, ll. 1-9. He explained further, "I believe there was a reference to, go interview one subject; then, go and interview another subject; coming back to the first subject, and going back and forth. I believe he also made reference to what they refer to as good cop/bad cop." R. 318, ll. 10-15. When asked, Chapman stated that he believed defense counsel asked him about interviewing Shatike Shabazz first, then interviewing Appellant and using Shabazz's alleged statements in an effort to pressure Appellant into providing more information. R. 318, l. 16 – 319, l. 11.

Lastly, Chapman claimed he did not recall testifying about the length of the second interview, whether Appellant was offered anything to eat or drink or given a bathroom break, whether Chapman made any threats or promises to Appellant, or whether Appellant appeared to be under the influence of any drugs or alcohol during the second interview. R. 319, l. 24 – 320, l. 18.

Master Sergeant Brian Baird testified that he did not "recall the specifics of the pretrial, but I know, because I advised him [Appellant] of his *Miranda* rights during my portion with him, that I believe we did do a *Jackson v. Denno*." R. 334, ll. 19-24. He maintained that he testifies in "so many of them [pretrial hearings] that I don't recall the specifics of this one." R. 334, l. 25 – 335, l. 4. However, he maintained that his *in camera* testimony during the Jackson v. Denno hearing would have been consistent with his testimony before the jury.

Baird admitted that he would have been questioned on additional matters during the pretrial hearing that did not come out during his testimony before the jury. For example, he stated, "[D]uring the pretrial motion, I believe I was asked what as the nature of . . . my contact with him [Appellant], and I said he was brought to me for a polygraph examination. Obviously, we wouldn't be mentioning that in the actual presence of the jury." R. 335, ll. 5-21.

Baird recalled testifying during the hearing that he administered the polygraph exam in “the polygraph suite” at the main headquarters of the Beaufort County Sheriff’s Office. Appellant was in custody, but he was not wearing handcuffs during the polygraph or interview. R. 340, ll. 10-15. Baird claimed he testified that he advised Appellant of his Miranda rights before he started the polygraph using the waiver of rights form that was marked as State’s Exhibit No. 30 at trial and that he “was actually asked to read the form into the record.” Baird stated that he testified Appellant signed the form indicating that he understood his rights and also signed the bottom of the form indicating that he wished to waive his rights. R. 336, l. 7 – 340, l. 5.

According to Baird, he was not questioned and did not testify about what questions he asked Appellant during the polygraph or about any specifics related to the polygraph “because the polygraph itself was not utilized during the trial, so we did not talk at all about the actual polygraph procedure itself.” R. 340, ll. 16-24. He further claimed Mr. Weidner did not question him regarding whether he told Appellant the results of the polygraph showed he was being deceptive. R. 340, l. 21 – 341, l. 4.

Moreover, Baird maintained that he testified Appellant did not appear to be under the influence of any drugs or alcohol during the interview and that he did not threaten Appellant or make him any promises. R. 341, l. 5 – 342, l. 1. Lastly, Baird claimed he testified that Brian Chapman entered the room after Baird had administered the polygraph and advised Appellant of his Miranda rights, and that Chapman began audio recording the interview as soon as he entered the room. Once Chapman entered, Baird excused himself and Chapman took over the interview. R. 342, l. 12 – 344, l. 2.

There was also discussion about when the Jackson v. Denno hearing actually took place: whether it occurred in February 2012 before Judge Young or whether it occurred in March 2012

before Judge Mullen. R. 328, ll. 12-23. When questioned by the court, Larry Weidner, Appellant's trial counsel, stated his recollection was that the hearing took place in February. He said, "I'm almost positive it was not before we started the trial in March. It would - - it predates our trial [in March 2012]. I just don't know if it was the day - - when I asked for the continuance [in February 2012], or if it was scheduled for another date that we did it." R. 329, l. 23 - 330, l. 3. Jim Bannon, the assistant solicitor who tried the case, stated that he "honestly couldn't tell you when we did it." R. 329, ll. 16-22. Bannon later stated, "I don't have any specific recollection of it. I think that . . . if the continuance was granted on Tuesday [February 28, 2012], that we probably would have held one on Monday, as that's our typical practice. But I don't have any specific memory of doing one that day." R. 456, ll. 11-15.

Judge Mullen indicated that she "would be surprised . . . if [she] didn't hear it [the Jackson v. Denno hearing]." R. 331, ll. 23-24. However, she acknowledged that the hearing could have been heard by Judge Young in February before he granted the continuance. R. 332, ll. 12-15.

Testimony of Larry Weidner

Larry Weidner testified that Appellant's case was first called to trial in February 2012, but he could not recall which judge presided. He explained that the parties qualified a jury that Monday morning, but he could not recall whether they actually selected a jury, or whether pretrial motions were heard that afternoon. Either way, his motion for a continuance was granted that Tuesday after Shabazz was offered immunity in exchange for his testimony against Appellant.

Weidner stated, "I remember the *Jackson v. Denno* hearing being separate from the trial starting in March. My recollection is that, when we came in March, we went straight to it, and I don't remember a separate *Jackson v. Denno* hearing in March. Now, whether we did it that afternoon [Monday, February 27, 2012], before we were starting the trial, or we did it as a separate

hearing in and of itself, I can't break that out in my memory." R. 347, l. 15 – 349, l. 22. Weidner could not recall whether Judge Mullen ever heard the Jackson v. Denno hearing or made a ruling on the matter. R. 349, l. 23 – 350, l. 7. All he could recall was that at some point a Jackson v. Denno hearing was conducted.

The only two witnesses Weidner recalled testifying at the Jackson v. Denno hearing were Master Sergeant Brian Chapman and Master Sergeant Brian Baird. He could not recall if Appellant or Officer Chris Wilson, who was present during the first interview on November 2, 2010, testified. He maintained that he did not recall the details of Chapman and Baird's *in camera* testimony, but he remembered generally "lines of questions I would have gone down with them." R. 351, l. 2 – 352, l. 1.

As far as the nature of his objection to the admissibility of Appellant's audio recorded statements, Weidner maintained that he had argued they were involuntarily given based on the coercive interrogation techniques used by the law enforcement officers, including the polygraph. Specifically, he stated, "The polygraph was being utilized as an interrogation tool to get him [Appellant] to talk to them more after he had already stopped talking to them." He also recalled arguing about the "good cop/bad cop technique that they [the officers] used on him [Appellant], that I also found was coercive. I don't remember the specifics of it . . . [I]t might have been having to do with the interview between Deputy Wilson and Master Sergeant Chapman . . . [T]hat's all I can remember." Weidner maintained that he would have asked Master Sergeant Chapman about the "good cop/bad cop" technique, but he does not remember any of his specific questions or Chapman's responses. R. 352, l. 2 – 358, l. 9.

Moreover, Weidner said he objected based on the "pitting the witnesses" technique used by the officers. He stated, "[T]hat's an interrogation technique that . . . I believe that they used, which

is, you know, you talk to one, and then you talk to the other . . . Shabazz is over here saying this about you, Mr. Seabrook [Appellant]. And then, you go in there and you say, hey, Seabrook's over here saying this about you, Mr. Shabazz. And you start pitting the witnesses against each other to find holes, if they exist, in their - - in their testimony." R. 364, l. 2 – 365, l. 5.

Weidner also recalled some sort of argument on whether the statements Appellant gave were "actually even admissions."¹¹ He stated that his objection had something to do with hearsay.¹² He maintained that because he did not think the statements were admissions, he argued the state was merely using the statements to impeach Appellant without Appellant taking the witness stand and "that's why they should have been excluded." Weidner testified, "By putting up what they [the state] claimed were confessions or admissions before he [Appellant] had testified, they were essentially shifting the burden to him . . . to come in and testify, or put him on the . . . stand to testify, okay, this is really what happened." R. 358, l. 10 – 363, l. 1.

Lastly, Weidner maintained that he recalled objecting under Rule 403, SCRE, to the relevancy of the statements since they were not admissions and also arguing that the statements "were more prejudicial than probative" since the state was "going to use them for inappropriate purposes." R. 358, l. 19 – 359, l. 4; R. 363, ll. 2-10.

¹¹ Weidner could not recall whether he cited to the definition of an admission, but stated that he had research and notes on the distinction between an admission and a confession. The printed research materials he discovered in his file state, "A confession is a complete acknowledgment of guilt of the crime on trial. An admission is any other statement of fact relevant to the charge made by the accused and offered against him as evidence of the facts. Such an admission has been termed a little brother of a confession." Weidner believed he read this research allowed during his objection. R. 365, l. 23 – 366, l. 10.

¹² When prompted or led, Weidner said his objection was related to Rule 801(d)(2), SCRE. However, Weidner never testified about whether he actually cited to that rule or not during the pretrial proceedings. R. 363, ll. 11-24.

He could not recall whether he cited to any case law in support of any of the arguments and objections he raised to the admissibility of Appellant's statements.

According to Weidner, whichever judge ultimately ruled on the admissibility of Appellant's statements, found that Appellant had voluntarily and knowingly waived his Miranda rights and that the statements were not coerced. Therefore, the judge found the statements were admissible. R. 365, ll. 9-22. However, importantly, Weidner could not recall whether the trial judge made a separate ruling on each of the specific arguments he raised in opposition to the statements. He stated, "I can't say that they did or they didn't. I really don't have a clear recollection of the *Jackson v. Denno* hearing." R. 366, l. 15 – 367, l. 3. He also could not recall what Assistant Solicitor Jim Bannon argued in response to his objections, if anything, or whether the trial court cited to any case law in support of its ruling. R. 367, ll. 12-22.

Additionally, it was undisputed amongst the parties that specific portions of Appellant's audio statements were redacted before the statements were played for the jury. However, Weidner could not remember what specific portions of the statements ultimately were redacted and if there were any portions he requested be redacted that were not redacted.¹³ R. 367, l. 23 – 370, l. 8.

In regards to the objection to the admissibility of several recorded telephone calls Appellant allegedly made to family members while in pretrial detention, Weidner stated that he remembered the issue, "but I don't remember what I did with it . . . I just remember there were a whole lot of telephone calls." However, he later testified that the solicitor "was trying to impeach my client [Appellant] before my client even took the witness stand. He explained, "There was at least one [recorded telephone call] where . . . Mr. Seabrook [Appellant] was talking to someone. I think it

¹³ The discussion about what should be redacted from Appellant's statements before the statements were played for the jury presumably occurred pretrial on the afternoon of March 19, 2012 because it does not appear in the available transcripts. However, it is clear from the March 20, 2012 transcript that Mr. Weidner had requested specific portions be redacted. See R. 134, l. 3 – 137, l. 15.

was his mom. And there was some statement in there about, if Shatike [Shabazz] doesn't say nothing and I don't say nothing, they got nothing. And I think Mr. Bannon [the solicitor] wanted that in, and I was trying to keep that out. And . . . there were a couple of phone calls with his mom, where all he was doing was saying, I wasn't there, and I wasn't involved, or something like that. And I think I was making the same objection . . . What relevance does that have?" R. 371, l. 4 – 372, l. 16. Weidner specified when prompted that he "probably" objected under Rule 403, SCRE, but he did not "remember specifically." He also stated that he believed he made a similar objection to the objection he raised during the Jackson v. Denno hearing that the statements Appellant made on the recorded telephone calls were not admissions and therefore not admissible. R. 372, l. 20 – 373, l. 6. Based on notes he had taken at the time of the pretrial hearing, Weidner also stated that he argued the recorded telephone calls were "more prejudicial than probative." R. 377, l. 18 – 378, l. 6.

However, Weidner could not recall whether the recorded telephone calls were redacted or played in their entirety. Moreover, he could not recall whether he requested that certain portions of the calls be redacted that were not ultimately redacted.¹⁴ R. 378, ll. 13-21. He also could not recall the trial court's ruling on his objection besides the generic statement that "it must have ruled against me" since the calls were admitted into evidence. R. 378, l. 25 – 379, l. 6.

After testifying about the motions and objections he raised pretrial on the afternoon of March 19, 2012, Weidner was also questioned about the inaudible portions of the March 20, 2012

¹⁴ There was also discussion and testimony during the reconstruction hearing about what portions of the recorded telephone calls were played for the jury. The recorded calls marked and entered as State's Exhibit Nos. 37 and 38 are not redacted and contain the telephone conversations in their entirety from start to finish. Jim Bannon stated that he did not believe there was any way to edit the recorded telephone calls, unlike the recordings of Appellant's audio statements. It was still unclear at the conclusion of the discussion which portions of the recorded calls were actually played for the jury. R. 433, l. 12 – 440, l. 1.

transcript. Most significantly, Weidner was questioned about an inaudible portion that appears on page 77 of the March 20, 2012 transcript related to his objection to State's Exhibit No. 26. This exhibit is a still shot of the blue Ford Explorer taken from the surveillance footage at the Exxon Station on the evening of October 4, 2010. When the court asked Weidner if he had any objection to the exhibit, his response is "inaudible." The court immediately followed by stating, "(inaudible) prior objection." The exhibit was then admitted into evidence. See R. 115, ll. 5-12.

Weidner testified at the reconstruction hearing that he had objected to the photograph marked as State's Exhibit No. 26 during trial. He believed his inaudible response was "same objection" and that the court's inaudible response was "subject to your prior objection." R. 391, l. 16 – 392, l. 6. Weidner asserted that "[t]here's a continuing objection out there somewhere," but he could not recall what the objection may have been. When asked if his objection was based on that fact that the still photograph was cumulative since the surveillance footage had already been played for the jury, Weidner said, "I mean, it sounds good. I just can't remember . . ." ¹⁵ R. 393, l. 22 – 394, l. 5.

Throughout the remainder of his testimony at the reconstruction hearing, Weidner was asked about numerous inaudible portions that appear throughout the testimony on March 20, 2012 and speculated as to what he believed each witness or party had stated at trial. Some of these inaudible portions occurred during Master Sergeant Brian Baird and Master Sergeant Brian Chapman's testimony about the two interviews and statements given by Appellant. See R. 405, l. 22 – 411, l. 15.

¹⁵ Judge Mullen stated her recollection was that Weidner's objection to State's Exhibit No. 26 "was a new objection . . . because I don't think he objected to the video [the surveillance footage from the convenience store] to begin with. I don't recall that, not as a pretrial . . . I think the only basis your objection could have been is that, somehow, it's [State's Exhibit No. 26 is] cumulative." R. 450, l. 25 – 451, l. 9.

Testimony of Jim Bannon

Jim Bannon, the assistant solicitor who represented the state at Appellant's trial, testified that he could not recall when the Jackson v. Denno hearing was held or which judge heard the matter. He stated it was possible that the parties conducted two separate Jackson v. Denno hearings before two different judges: one in February 2012 and one in March 2012 before Judge Mullen. Bannon maintained that, based on his recollection, only Master Sergeant Brian Baird and Master Sergeant Brian Chapman testified during the hearing. He did not recall whether Appellant testified at the hearing or the order in which the witnesses testified. R. 459, l. 7 – 461, l. 10.

Bannon testified that he did not specifically recall Baird's testimony or the questions that he asked Baird during the pretrial hearing. However, he believed he would have asked Baird about the polygraph test. Bannon maintained that he believed Baird testified *in camera* "as to his experience and his training . . . and the procedure that he goes through to administer them [polygraph examinations]," but he could not specifically recall Baird's testimony in this regard R. 461, l. 11 – 462, l. 15. He also could not recall whether Baird testified that he told Appellant the results of the polygraph showed he was being deceptive. R. 462, ll. 16-22. Bannon said he would have asked Baird about whether he read Appellant his Miranda rights and he would have gone through the waiver of rights form with Baird, but he does not specifically recall doing so. R. 462, l. 23 – 463, l. 12.

Bannon also could not specifically recall Master Sergeant Brian Chapman's pretrial testimony, but maintain it would have been very similar to his testimony before the jury. R. 463, ll. 13-17.

As far as the nature of Mr. Weidner's objection to the admissibility of Appellant's recorded statements, Bannon testified that he recalled there was a "sort of ongoing objection to . . . whether or

not these were admissions or statements.” He said, “[W]e just argued our sides, in regard to his [Weidner’s] objections as to relevancy, and the other rules of procedure and evidence.” He stated that he “would imagine that” Weidner objected pursuant to Rule 403, SCRE, and that Weidner argued the interrogation techniques used by the officers were coercive because “that’s typically what defense attorneys do.” But Bannon had no specific recollection of Mr. Weidner’s arguments. R. 463, l. 18 – 464, l. 14. Moreover, he could not recall whether Weidner cited to any specific case law in support of his arguments. R. 465, ll. 9-11.

Additionally, Bannon could not recall whether the trial judge ruled individually on each component of Mr. Weidner’s objection or whether the court simply found Appellant had knowingly and voluntarily waived his Miranda rights and that the statements were admissible. Specifically, he stated, “I don’t recall whether they were individual. If Judge Mullen sort of went down one-by-one, by each of those, or whether or not she just made a blanket statement that she found that . . . they were admissible.” R. 465, l. 12 – 466, l. 1.

As far as redactions, Bannon testified that he redacted Appellant’s audio recorded statements before they were played for the jury to remove portions related to Appellant’s “criminal history” and that fact that he was on probation or parole. However, he claimed that the parties agreed on all of the redactions and that there were no additional redactions that Weidner requested. R. 466, l. 2 – 467, l. 11.

In reference to the objection related to the recorded telephone calls Appellant made while in pretrial detention, Bannon testified, “[T]he purpose of playing the jail phone calls [was] . . . he [Appellant] made statements . . . to other individuals over the phone, which not only tend to incriminate him, but when they don’t incriminate him, they conflict with previous versions of events that he had . . . given to investigators.” R. 467, ll. 12-23. He could not recall Mr. Weidner’s

specific objection to the telephone calls, but he believed the objection was related to relevancy and “burden-shifting.” R. 467, l. 24 – 468, l. 19. Bannon also could not specifically recall Judge Mullen’s ruling on the admissibility of the telephone calls beside the fact that she admitted them into evidence and allowed Bannon to publish the calls to the jury. R. 468, ll. 20-22. Moreover, he could not recall which portions of the telephone calls were played for the jury, but he believed “both sides of the conversations” were played, not simply the statements made by Appellant. R. 468, l. 23 – 469, l. 6.

Additionally, Bannon testified that he could not remember the grounds of Weidner’s objection to State’s Exhibit No. 26, the still photograph taken from the surveillance footage. He said the only objection he could think of would be based on that fact that it “duplicative.” He thinks this objection was raised during the course of the trial because he did not remember any discussion about it pretrial. R. 469, l. 20 – 470, l. 12.

Judge Mullen’s Recollections

Judge Mullen stated that she recalled ruling Appellant’s statements were admissible based on the following findings: (1) Appellant knowingly and voluntarily waived his Miranda rights, (2) there was no evidence of coercion, and (3) under Rule 801(d)(2), SCRE, Appellant’s statements were admissions. R. 474, l. 3 – 476, l. 24. However, she stated that “it still bothers me not knowing if I did it [the Jackson v. Denno hearing] in February [2012] or if some other judge did.” R. 483, ll. 9-11. Judge Mullen maintained that if another judge heard the matter in February 2012, she would have reheard it in March 2012 and made her own ruling. R. 481, l. 8 – 482, l. 3.

Additionally, Judge Mullen stated, “I do not believe that the phone conversations were brought up pretrial at all. I think they [the objections] were at the time of trial . . . So, that would not have been a pretrial motion.” As far as her ruling, Judge Mullen said her ruling that the recorded

telephone calls were admissible was based on the fact that “there’s no expectation of privacy on a jail phone call . . .” R. 478, l. 8 – 479, l. 15.

Motions and Ruling by the Court

Counsel for Appellant argued at the end of the hearing that the record had not been reconstructed to allow for meaningful appellate review as required by State v. Ladson, 373 S.C. 320, 644 S.E.2d 271 (Ct. App. 2007), especially given this state’s strict issue preservation rules. She argued that the efforts at the reconstruction hearing had merely created a “general summary” of what Mr. Weidner believed his objections and arguments were during the pretrial proceedings on March 19, 2012, but that the parties were unable to reconstruct the specific arguments raised. Moreover, it is unclear whether Weidner cited to any case law during his objections. Additionally, counsel argued that the specific rulings made by the trial court were unclear and only recalled in a general fashion. Therefore, counsel argued Judge Mullen should find the record was not reconstructed to allow for meaningful appellate review. R. 486, l. 5 – 490, l. 5.

Judge Mullen ultimately found that the record had been reconstructed and is “adequate for review by the Court of Appeals.” R. 491, l. 24 – 493, l. 18; See R. 499.

Discussion

The court erred by finding the record of Appellant’s trial was sufficiently reconstructed to allow for meaningful appellate review given the summary fashion in which the pretrial testimony, motions, and arguments were recalled at the reconstruction hearing and this state’s strict issue preservation rules.

South Carolina jurisprudence recognizes the trial court’s authority to set the record for appeal. State v. Ladson, 373 S.C. 320, 324, 644 S.E.2d 271, 273 (Ct. App. 2007). When a transcript has been lost or destroyed, an appellate court may remand to have the record

reconstructed. Whitehead v. State, 352 S.C. 215, 221, 574 S.E.2d 200, 203 (2002); See Koon v. State, 358 S.C. 359, 367, 595 S.E.2d 456, 460 (2004) (recognizing a court's power to remand for a reconstruction hearing), *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 105, 610 S.E.2d 494, 501 (2005).

“[T]he inability to prepare a complete verbatim transcript, in and of itself, does not necessarily present a sufficient ground for reversal.” Ladson, 373 S.C. at 324, 644 S.E.2d at 273 (quoting Smith v. State, 291 Md. 125, 136, 433 A.2d 1143, 1148 (1981)) (internal quotation marks omitted). The party challenging a reconstructed record on appeal must demonstrate prejudice flowing from an inadequate record. Id. at 325, 644 S.E.2d at 273. A reconstructed record on appeal must allow for “meaningful appellate review.” Id. at 325, 644 S.E.2d at 273-274. “A new trial is therefore appropriate if the appellant establishes that the incomplete nature of the transcript prevents the appellate court from conducting a meaningful appellate review.” Id. at 325, 644 S.E.2d at 275 (quoting In re D.W., 171 N.C.App. 496, 502, 615 S.E.2d 90, 94 (2005)) (internal quotation marks omitted); See State v. Chanze, 211 W.Va. 257, 565 S.E.2d. 379, 382-383 (2002) (finding a criminal defendant is entitled to meaningful appellate review of his lower court proceedings, and if this is not possible from the reconstructed record, a new trial is proper).

In Ladson, this Court reversed Ladson's conviction and sentence after finding the reconstructed record of Ladson's three day trial was “largely conclusory, with testimony, objections, and the like recalled only in summary fashion.” Ladson, 373 S.C. at 323, 644 S.E.2d at 272. The Court noted that the reconstructed record merely contained “references to generic motions and objections,” but “the specific nature of the motions, and whether the challenged evidence was cumulative to other unchallenged evidence” was unknown. Id. at 327, 644 S.E.2d at 274. This Court ultimately held Ladson established prejudice and demonstrated that the reconstructed record

did not allow for meaningful appellate review. Id. at 325-326, 644 S.E.2d at 274. In so holding, this Court emphasized South Carolina's strict issue preservation rules. Id. at 326, 644 S.E.2d at 274.

Here, the hearing to reconstruct the record of the pretrial proceedings that took place before the start of Appellant's trial occurred over three years after he was tried and convicted. An adequate record of the pretrial proceedings is essential for Appellant to receive meaningful appellate review, especially given this state's issue preservation rules, since throughout the course of Appellant's trial his counsel merely renewed prior objections he had raised pretrial without specifying any grounds for the objection.¹⁶ See Ladson, 373 S.C. at 326, 644 S.E.2d at 274. The trial court admitted evidence on numerous occasions simply indicating "subject to prior objection."

The potential issues for appeal that Appellant was able to identify during the reconstruction process were, *inter alia*: (1) the voluntariness and admissibility of Appellant's statements to law enforcement that were marked and entered as State's Exhibit Nos. 28 and 29, (2) the admissibility of a photograph marked and entered as State's Exhibit No. 26, and (3) the admissibility of recorded telephone calls Appellant made while in pretrial detention at the Beaufort County Detention Center marked and entered as State's Exhibit Nos. 37 and 38.

While Appellant has been able to identify some of the potential issues for appeal, the objections and arguments made by defense counsel below as well as the trial court's rulings were "recalled only in summary fashion." Consequently, the reconstructed record is "largely conclusory" making it insufficient for meaningful appellate review. See Ladson, 373 S.C. at 323, 644 S.E.2d at 272. The specific arguments made by defense counsel at trial as well as the

¹⁶ An adequate record of the pretrial proceedings is also essential for Appellant to collaterally challenge his conviction and sentence through post-conviction relief where he will likely allege ineffective assistance of counsel. The absence of an adequate record of the motions, objections, and specific arguments made by trial counsel pretrial will greatly hinder Appellant's ability to allege ineffective assistance of counsel. See Ladson, 373 S.C. at 327, 644 S.E.2d at 275.

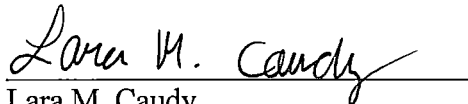
trial court's rulings remain unclear. It is also possible that additional motions and objections were raised pretrial that remain unknown to the parties.

The reconstructed record lacks the completeness necessary for this Court to engage in meaningful appellate review. If this Court holds this record is sufficient, it will likely guarantee an affirmance of Appellant's conviction and sentence of life without parole without a genuine review. Further, the absence of an adequate record will greatly hinder Appellant's ability to allege ineffective assistance of counsel during subsequent post-conviction relief proceedings. Respectfully, this Court should hold the reconstructed record does not permit meaningful appellate review, reverse Appellant's conviction and sentence, and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse the ruling of the circuit court finding the record of his trial has been sufficiently reconstructed to allow for meaningful appellate review, reverse his conviction and sentence, and remand for a new trial.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 3rd day of May, 2016.

5

CERTIFICATE OF COUNSEL FOR APPELLANT

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."

May 3rd, 2016

Lara M. Caudy

Lara M. Caudy
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1330

RECEIVED
MAY 03 2016
SC Court of Appeals

RECEIVED
MAY 03 2016
SC Court of Appeals

9

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
MAY 03 2016
SC Court of Appeals

Appeal from Beaufort County

Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TERRANCE SEABROOK,

APPELLANT

APPELLATE CASE NO. 2015-001495

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 Jennifer Ellis Roberts, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 3rd day of May, 2016.

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 3rd day of May, 2016.

[Signature]

(L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.