STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County

Honorable Michael G. Nettles, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICHAEL D. BROOKS,

APPELLANT

APPELLATE CASE NO. 2015-001384

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial judge err in refusing to suppress a letter written by the Appellant to an investigator and Appellant's attorney because the letter was not an admission but rather a statement made in the course of plea negotiations and inadmissible pursuant to Rule 410, SCRE?

2. Did the trial judge err in refusing to suppress a recorded jail phone call when the State failed to establish a proper foundation?

STATEMENT OF THE CASE

In July of 2014, the Florence County Grand Jury indicted Appellant Brooks for armed robbery, burglary first degree, kidnapping, possession of a weapon during the commission of a violent crime and possession of a firearm by a person convicted of a violent offense, indictment #2014-GS-21-00813. On June 15, 2015, Appellant proceeded to jury trial before the Honorable Michael G. Nettles. Ralph J. Wilson represented Appellant at trial. John C. Jepertinger and David Richardson prosecuted the case. The jury found Appellant guilty as charged. Judge Nettles sentenced Appellant to thirty (30) years concurrent for armed robbery, burglary first degree and kidnapping and five (5) years concurrent on the weapons charges. A timely notice of intent to appeal was served on June 25, 2015. This appeal follows.

STATEMENT OF FACTS

On Monday March 3, 2014, right before noon Larry Murphy answered the doorbell that was ringing on his garage door. When he answered the door a man forced himself inside the house at gun point. (R.pp. 92-93). Once inside the house another man came inside and began to bind Mr. Murphy and his wife Cara Murphy with duct tape. (R.p. 94, ll. 1-10). One of the men was demanding money. (R.p. 95, ll. 23-25). One of the men rummaged through a wallet and a purse, went upstairs and then eventually both left the house. (R.pp. 96-97). Mr. Murphy was able to free himself and his wife and call the police. (R.p. 98, ll. 1-6).

Once the police arrived the Murphys discovered that jewelry was missing from upstairs. In particular, a medallion with an engraved letter "C." (R.pp. 111-112). Franklin Jones, a retail jeweler, testified that the police asked him to be on the look out for a hammer designed pendant with the "C" initial on it." (R.p. 150, ll. 1-4). Jones testified that on March 13th one of his regular customers came into the store wearing the pendant the police were looking for. (R.p. 150, line 5 – 25; p . 154, ll. 1-16). Jones contacted the police the next day. The police contacted the regular customer, Darlene Howard, who gave the necklace to the police. (R.p. 159, ll. 5-18). Ms. Howard testified that she bought the necklace from Tashsa McNeil. (R.p. 157, line 17 – p. 158, ll. 1-22). Tasha McNeil testified that she bought the necklace from Appellant. (R.p. 163, ll. 1-22). Appellant's photo was placed in a photo line-up and Mr. Murphy identified Appellant from the line-up as the person who most closely resembled the first man who entered the house. (R.p. 48, line 17 – p. 49, ll. 1-21). Mrs. Murphy did not identify Appellant. (R. p. 49, line 24 – p. 50, ll. 1-2).

On March 14, 2014, the police arrested Appellant who implicated his cousin, Gregory Campbell and Terrance Baker, a.k.a. "Boogie." (R.p. 257, ll. 9-25). Appellant told police that Campbell saw Mr. Murphy at the bank with money and Campbell and "Boogie" committed the

robbery. (R.p. 258, ll. 1-12). Police obtained the bank video and confirmed that Campbell was at the bank at the same time as Mr. Murphy. (R.p. 258, line 13 – p. 259, ll. 1-2). The police arrested Campbell and found a roll of duct tape in his bedroom. (R.p. 262, line 1 – p. 263, ll. 1-10). The DNA analyst from the South Carolina Law Enforcement Division [SLED] testified that the duct tape used to bind Mr. Murphy contained a mixture of DNA from at least two individuals but the major contributor matched Appellant's DNA profile. (R.p. 398, ll. 4-19).

Appellant testified that on the morning of the robbery he was with Danny, the manager of trailer park where Appellant lived, from about 10:30 AM until about 11:30 AM or 12:00 noon when he walked to the store to get some lunch. (R.p. 455, line 20 – p. 457, ll. 1-6). Appellant testified that he returned to his trailer between 1:00 PM and 2:00 PM. (R.p. 457, line 7 – p. 458, ll. 1-14). Appellant testified that later in the afternoon his cousin Campbell and Boogie drove into the trailer park and told Appellant about a lick they had done that day. (R.p. 459, line 4 – p. 460, ll. 1-8). Appellant testified that Campbell and Boogie showed him some jewelry. (R.p. 460, ll. 8-15). Appellant admitted taking pieces of the jewelry without Campbell and Boogie's knowledge. (R.p. 460, ll. 16-21). Appellant admitted selling the two necklaces to Tasha McNeil. (R.p. 461, ll. 3-20). Appellant explained that the month before the robbery he used Campbell's duct tape to help Campbell install car speakers. (R.p. 465, line 7 – p. 466, ll. 1-20).

ARGUMENTS

1. The trial judge erred in refusing to suppress a letter written by the Appellant to an investigator and Appellant's attorney because the letter was not an admission but rather a statement made in the course of plea negotiations and inadmissible pursuant to Rule 410, SCRE.

The State moved to introduce a letter, dated April 7, 2015, written by Appellant to Investigator Justin Head with the Florence Police Department and Appellant's lawyer, Ralph Wilson. (R.pp. 213-216). The State argued that the letter was admissible because it contained an admission. (R.p. 216, ll. 16-24). The State offered to redact portions of the letter dealing with sentences. (R.p. 216, ll. 16-18). Appellant objected to admission of the letter on the ground that the letter was a statement made in the course of plea negotiations and inadmissible pursuant to Rule 410, SCRE. (R.p. 219, line 18 – p. 220, ll. 1-21). The judge overruled the objection stating:

> If they can lay the proper foundation, I'm going to allow it in because it's an admission against interests. I don't think that it is, indeed, plea negotiations because I think what the rule anticipates is that if you and the Solicitor and you are saying, well, I'll take five, you know, if you plead guilty or I'll take ten and then there's discussion about the merits of the defense and the merits of the prosecution, all of that I think would be precluded by the rule. But I do, indeed, find that this is an admission against interests and I'm going to allow Mr. Jepertinger to redact all of the stuff, with the exception of that core part about his admission and going in and this and that, the admission that he wants into evidence. And then—however, if you want to get into discussion about the sentences and that sort of thing, I'll allow you to do that at your own risk, whatever you want to do.

(R.p. 221, ll. 10-25).

The State then marked as a Court's Exhibit the un-redacted letter, State's Exhibit #9 (R. p. 601) and marked for identification State's Exhibit #10, the redacted version of the letter. (R.p. 227, ll. 1-22). Appellant again objected to the letter arguing it was not an admission. (R.p. 275, line 11 – p. 235, ll. 1-2). Appellant then argued that if the judge was going to admit the letter, the un-redacted letter should be admitted rather than the redacted version of the letter. (R.p. 235, line 8 – p.

236, ll. 1-6). Both the State and the judge agreed to the admission of the un-redacted letter, State's Exhibit #9. State's Exhibit #10 was then marked as Court's Exhibit #1. (R.p. 236, ll. 8-12).

Appellant later changed course and argued that if the judge was going to admit the letter, the redacted version of the letter should be admitted rather than the un-redacted letter. (R.p. 278, line 15 – p. 281, ll. 1-17). Appellant stipulated to the redaction of the letter but renewed the objection to the admission stating, "And, Your Honor, and I say stipulation, it's by stipulation in terms of admitting it, but we have made some objection about it coming in. We didn't want it in, in the first place, but we stipulate to the fact that if it going to come in, that's the form we want it to come in." (R.p. 282, ll. 13-17). The redacted version of the letter was admitted in evidence as State's exhibit #10 over objection. (R.p. 285, ll. 1-6). Then, during the defense case, Appellant introduced, over the State's objection, the un-redacted version of the April 7, 2015, letter as Defense Exhibit #1. (R.p. 781, ll. 11-19).

The redacted version of the letter admitted in evidence as State's Exhibit #10 (R. p. 602) reads as follows:

> Dear Justin Head and Ralph Wilson my attorney:
>
> Let them know if Michael's willing to admit to being present and being the one who was ordered to put the duct tape on. That, it was Campbells idea because he was in the bank and thought the man was depositing the money and I went along with him and followed him into the residence and I will be willing to testify to this. I'm ready to end this and move on with my life.

(R. p. 602, State's Exhibit #10).

The un-redacted version of the letter, State's Exhibit #9 (R. p. 601) and Defense Exhibit #1, reads as follows:

> Dear Justin Head and Ralph Wilson my attorney:
>
> How are you doing, You, (Justin) told me in our interview if I wasn't the

one holding the gun then that you would have my charges lowered. I do not know how my DNA got on the tape that was used on those people, but I have a feeling you and Bannister did that. I am ready to end this nightmare and drop the lawsuit. Heres my offer You talk to my lawyer and the Solicitor. Let them know if Michael's willing to admit to being present and being the one who was ordered to put the duct tape on. That, it was Campbells idea because he was in the bank and thought the man was depositing the money and I went along with him and followed him into the residence and I will be willing to testify to this. I'm ready to end this and move on with my life. In order I plead to assesary saying I was Campbell's accomplish. And I'll plead to anything between 5-10 years. I will do this instead of having "Sled" look into when the items were sent off. or still getting my case dismissed for "warrant-less unconstitutional arrest" or "bad faith warrants' (no log for jewelry). False Arrest If I can go ahead and set this meeting up and get an agreement from the solicitor, then I will give my statement against Campbell go ahead and plead so I can go ahead up the road and be called back to trail when I am needed. Below is my lawyer's name and phone number.

I have a written statement prepared.

Justin & Ralph
P.S. I know you feel the same way I do. Let's close out this case and end this lawsuit. What I'm offering is an honest way between us to do this. If you would be a man of your word, Justin, I'm ready to end this. I'm also sending my lawyer a copy. 5-10 years means the less I could do is five and the most ten.

R. p. 601, State's Exhibit #9).

Neither version of the letter should have been admitted in evidence because the letter was a statement made in the course of plea negotiations and inadmissible pursuant to Rule 410, SCRE.

Rule 410, SCRE, provides:

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(1) a plea of guilty which was later withdrawn;
(2) a plea of nolo contendere;
(3) any statement made in the course of any court proceedings regarding either of the foregoing pleas; or
(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

> However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

While the statement was made to Investigator Head rather than an attorney for the prosecuting authority, the investigator admitted telling Appellant that if he cooperated the investigator would be more than happy to speak to the solicitor on Appellant's behalf and help him out as much as possible. (R.p. 229, line 15 – p. 232, ll. 1-5).

The dissent in State v. Wills, 409 S.C. 183, 193-94, 762 S.E.2d 3, 8 (2014), reh'g denied (Aug. 22, 2014), discussed rule 410, SCRE and wrote:

> In reviewing the legislative history of Rule 410, it is clear Congress recognized that statements made during the course of plea negotiations are decidedly different than other voluntary statements and, thus, sought to limit their admissibility. *See* Advisory Committee Notes to Rule 410, FRE ("As with compromise offers generally ... free communication is needed, and security against having an offer of compromise or related statement admitted in evidence effectively encourages it."); Paul F. Rothstein, *Federal Rules of Evidence Rule 410* (3d ed.2012) (discussing legislative history of Rule 410 and stating, "The rule has a number of purposes, the most significant of which is to encourage the early disposition of criminal cases without the cost, expense, and uncertainty of trial. It protects the accused from being placed in the untenable position of having a right to withdraw a guilty plea but being forced to take the stand in order to explain that decision at trial." (footnote omitted)). Were there not this distinction, it would have been unnecessary for Congress to promulgate a rule to protect statements made during plea negotiations.
>
> In examining this distinction, the Fifth Circuit Court of Appeals explained that [p]lea negotiations are inadmissible, but surely not every discussion between an accused and agents for the government is a plea negotiation." United States v. Robertson, 582 F.2d 1356, 1365 (5th Cir.1978). "Suppressing evidence of such negotiations serves the policy of insuring a free dialogue only when the accused and the government actually engage plea negotiations: 'discussions in advance of the time for pleading with a view to an agreement whereby the defendant will enter a plea in the hope of receiving certain charge or sentence concessions.' " Id. (quoting ABA Standards, Introduction at 3). State v. Wills, 409 S.C. 183, 193,

762 S.E.2d 3, 8 (2014), reh'g denied (Aug. 22, 2014). The court noted that "plea negotiations contemplate a bargaining process, a 'mutuality of advantage,' and a mutuality of disadvantage. That is, the government and the accused both seek a concession for a concession, a Quid pro quo. The accused contemplates entering a plea to obtain a concession from the government. The government contemplates making some concession to obtain the accused's plea." Id. at 1365–66 (citations omitted). Thus, in assessing the admissibility of a defendant's statement, it is necessary to "distinguish between those discussions in which the accused was merely making an admission and those discussions in which the accused was seeking to negotiate a plea agreement." Id. at 1367.

In the present case the Appellant, a year after arrest, attempted to negotiate a plea agreement with the State. Appellant was willing to say he was present and was ordered by Campbell to bind the Murphys with duct tape in exchange for a sentence of between five and ten years. Appellant was only willing to make the statements in exchange for a sentence of between five and ten years. In the letter Appellant urges the investigator to contact the solicitor and Appellant's attorney. The investigator told Appellant that he would intercede with the solicitor on Appellant's behalf. (R.p. 231, ll. 1-6). Appellant was not merely making an admission. The statements contained in the letter were made in the course of plea negotiations. Pursuant to Rule 410, SCRE, the statements contained in the letter were inadmissible. The error in refusing to suppress the letter was not harmless.

2. The trial judge erred in refusing to suppress a recorded jail phone call when the State failed to establish a proper foundation.

During trial the State moved to admit a recording of a purported telephone conversation between Appellant and another individual made while Appellant was in jail. (R.pp. 265-267). In opening statement the State told the jury, "...[H]e makes a phone call that's recorded from the detention center to somebody and says, tell Greg if they come looking for him, to keep his effing mouth shut . . .(R.p. 75, ll. 15-18). Appellant's cousin and co-defendant is Gregory Campbell. Appellant objected to the admission of the recording based on the State's failure to lay a proper

foundation. (R.p. 267, line 7). The judge overruled the objection and a recording of the jail phone call was entered into evidence as State's Exhibit #5 and published to the jury. (R.p. 267, ll. 8-11). The trial judge erred in admitting the recording of the jail phone call.

When asked about the jail phone calls, Investigator Head testified, "I never spoke to Mr. Neil but I did listen to phone conversations. I have access to the Florence County – all law enforcement can listen to all jail conversations between inmates to outgoing individuals, family and friends and such and such. They're all recorded." (R.p. 266, ll. 2-6). The investigator then testified that he listened to a phone conversation that Appellant made to another individual. (R.p. 266, ll. 9-14). Other than stating it was a phone call made from the detention center, the investigator failed to identify the phone call in any meaningful manner. The investigator did not testify how he could determine who made the phone call or who received the phone call. The investigator did not testify about any specific telephone numbers or pin numbers used. While the investigator testified that he listened to a phone conversation between Appellant and another individual, the investigator never specifically identified the voices on the recording. The State failed to lay the proper foundation for the admission of the recorded telephone conversation.

Rule 901(a), SCRE, provides that, "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what it proponent claims." Rule 901(b)(5), SCRE, provides that the proponent of voice identification evidence may satisfy the threshold authentication requirement of Rule 901(a) by "Identification of a voice whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker." The investigator in the present case failed

to specifically identify appellant's voice. The State failed to properly authenticate the recorded jail telephone calls.

Rule 901 of the South Carolina Rules of Evidence is identical to the federal rule with the exception of subsection (b)(10). In United States v. Spence, 566 F. App'x 240, 243 (4th Cir. 2014), cert. denied, 135 S. Ct. 943, 190 L. Ed. 2d 840 (2015) the Court wrote:

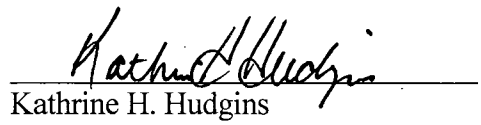
> The proponent of an audio recording carries the burden of demonstrating that the recording was sufficiently authentic to be admitted into evidence. United States v. Wilson, 115 F.3d 1185, 1188–89 (4th Cir.1997). Under Federal Rule of Evidence 901(a), the requirement for authentication is satisfied when there is "evidence sufficient to support a finding that the item is what the proponent claims it is." Illustrative examples of such evidence include (1) testimony by a knowledgeable witness that "[the audio recording] is what it is claimed to be," Fed.R.Evid. 901(b)(1); (2) "[a]n opinion identifying a person's voice—whether heard firsthand or through mechanical or electronic transmission or recording—based on hearing the voice at any time under circumstances that connect it with the alleged speaker," *id.* at (b)(5); or (3) testimony "describing a process or system and showing that it produces an accurate result," *id.* at (b)(9). "We have consistently allowed district courts wide latitude in determining if a proponent of tape recordings had laid an adequate foundation from which the jury reasonably could have concluded that the recordings were authentic and, therefore, properly admitted." United States v. Branch, 970 F.2d 1368, 1372 (4th Cir.1992).

In the present case the State failed to establish that the recorded jail phone call was made by Appellant. The State failed to lay an adequate foundation from which the jury reasonably could have concluded that the recorded jail phone call was authentic. The judge erred in admitting the recording. The error is not harmless.

CONCLUSION

Based on the above arguments, Appellant convictions and sentences should be reversed and the case remanded for a new trial.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of December, 2016.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant 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."

December 16, 2016

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