STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Honorable Thomas W. Cooper, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

AUSTIN MCQUARTERS,

APPELLANT

APPELLATE CASE NO. 2015-001814

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

In this trial for the armed robbery and assault and battery of John Snodgrass, the manager of a movie theatre, did the trial judge abuse his discretion in refusing to grant a new trial based on after-discovered evidence in the form of statements, taken after the trial, from another manager of the movie theatre that, two weeks prior to the robbery and assault, Snodgrass yelled at an employee of the theatre, Colton Delaplane, and in response Deloplane stated that he wanted to hit Snodgrass in his face and later confessed that he knew about the money but did not know that Snodgrass was going to be hurt so badly during the robbery?

STATEMENT OF THE CASE

In January of 2014, the Beaufort County Grand Jury indicted Appellant McQuarters for armed robbery and assault and battery first degree, indictments #2013-GS-07-1844, 1845. On July 20, 2015, Appellant proceeded to jury trial before the Honorable Thomas W. Cooper, Jr. This was a re-trial as the first trial ended with a hung jury. This second jury returned verdicts of guilty as charged. Judge Cooper sentenced Appellant to twenty-five (25) years for armed robbery and ten (10) years concurrent for assault and battery. On August 12, 2015, Judge Cooper reduced the twenty-five (25) year sentence for armed robbery to twenty (20) years. A timely notice of intent to appeal was served on August 20, 2015. This appeal follows.

STATEMENT OF FACTS

On October 20, 2013, between 10:30 and 11:00 PM John Snodgrass, the general manager of a movie theatre on Hilton Head Island, was robbed and assaulted as he left the theatre with the bank deposit bag. (R. pp. 95-107). Snodgrass testified that he noticed a female in a small older Toyota and a six foot tall broad shouldered African American man crouched down by the driver's door. (R. p. 99, line 3 – p. 100, lines 1-6). The man approached Snodgrass and initially asked about movie times, then asked to borrow a cellphone, then asked for the time of day. When Snodgrass looked down at his watch, the man assaulted and robbed him. (R. p. 100, line 11 – p. 101, 102, lines 1-18).

Investigator Doug Seifert with the Beaufort County Sheriff's Department interviewed employees of the movie theatre who were working on the night of the robbery including employee Colton Delaplane. (R. p. 339, line 21 – p. 340, 341, lines 1-22). Based on the interview with Delaplane, Investigator Seifert obtained arrest warrants for Appellant McQuarters and Jacklyn "Brooklyn" Perez. (R. p. 343, lines 15-17). The investigator admitted that in his report he stated that Delaplane confessed that the entire robbery was set up by him, he was sorry and admitted that McQuarters gave Delaplane two hundred and fifty ($250.00) after the robbery. (R. p. 364, lines 7 – 24). The investigator, however, testified that these were not Delaplane's exact words and explained that he was paraphrasing Delaplane when he wrote the report. (R. p. 345, line 9 – p. 346, lines 1-12). The investigator admitted that in the first trial that ended in a mistrial he did not explain that his report was his conclusion or a paraphrase and not Delaplane's exact words. (R. p. 366, lines 1-25). Delaplane was never arrested or charged in connection with the robbery and assault. (R. p. 345, lines 16-18).

Appellant admitted being at the movie theatre with a female on the night of the robbery but denied robbing and assaulting Snodgrass. (R. p. 357, line 9 – p. 358, lines 1-3). There was no forensic evidence linking Appellant to the robbery and assault. (R. p. 372, line 25 – p. 373, lines 1-25). Snodgrass was unable to identify Appellant in a photo line-up. (R. p. 122, lines 3-10). Both Perez and Delaplane testified against Appellant at trial. After Perez testified but before Delaplane testified these two witnesses violated the sequestration order. Appellant moved for a mistrial which the trial judge denied finding no prejudice. (R. pp. 209 – 225). Delaplane testified that he was working at the movie theatre on the night of the robbery and assault. (R. p. 294, lines 14-25). Delaplane testified that he saw both Appellant and Perez at the movie theatre that night. (R. pp. 295-296). Delaplane claimed that while he was working in the ticket booth, Appellant approached and wanted money from the drawer. (R. p. 295, lines 3-15). Perez admitted that she asked Delaplane, "Where is the bread?" but claimed she was referring to gas money Delaplane owed her. (R. p. 161, lines 4-21; p. 148, lines 13-19).

According to Delaplane, he again saw Appellant and Perez in the parking lot when he left work at 10:30 PM. (R. p. 295, line 21 – p. 296, lines 1-17). Delaplane claimed he left the movie theatre parking lot with his sister and girlfriend and went home. (R. p. 298, lines 11-19). Delaplane testified that about three hours later he met Appellant who handed him two hundred and fifty ($250.00) dollars. (R. p. 299, lines 1-19). According to Delaplane, Appellant told him, "I ran into money at your work." (R. p. 299, lines 14-15).

ARGUMENT

In this trial for the armed robbery and assault and battery of John Snodgrass, the manager of a movie theatre, the trial judge abused his discretion in refusing to grant a new trial based on after-discovered evidence in the form of statements, taken after the trial, from another manager of the movie theatre that, two weeks prior to the robbery and assault, Snodgrass yelled at an employee of the theatre, Colton Delaplane, and in response Delaplane stated that he wanted to hit Snodgrass in his face and later confessed that he knew about the money but did not know that Snodgrass was going to be hurt so badly during the robbery.

On July 28, 2015, six days after the jury returned verdicts of guilty, Appellant filed a motion to vacate conviction and order a new trial based on after discovered evidence. (R. p. 545 - Notice of motion and motion to vacate conviction and order a new trial). The State filed a response on August 12, 2015. (R. p. 547 - Response). The motion was based on information, not previously provided to law enforcement, from another manager at the movie theatre.

On July 24, 2015, the general manager who was robbed and assaulted, John Snodgrass, contacted Investigator Seifert of the Beaufort County Sheriff's Department and advised him that his manager, Chisti "Randi" Ross, had information indicating that an employee, Colton Delaplay, set up the robbery. (R. p. 540 - Court's Exhibit #1 – page 3). The investigator interviewed Ross and she provided a written statement. (R. p. 540 - Court's Exhibit #1 – pages 3-5). In her statement Ross wrote that on November 3, 2013, while working with Delaplane, he told her "I knew about the money but I didn't know John was going to get hurt like that." (R. p. 540 - Court's Exhibit #1 – page 5). Ross told the investigator that she did not provide this information to the police because she did not want to be involved in the investigation due to an unrelated criminal domestic violence incident. (R. p. 540 - Court's Exhibit #1 – page 3). Ross also told the

investigator that two weeks prior to the incident Snodgrass yelled at Delaplane. Delaplane told Ross that he wanted to punch Snodgrass in the face for yelling at him. Ross told the investigator that Delaplane stated, "If John ever screams at me in my face again, I'm going to punch him." (R. p. 540 - Court's Exhibit #1 – page 4). Ross was not called as a witness at trial.

On August 12, 2015, the Honorable Thomas W. Cooper, Jr. held a hearing on the motion to vacate conviction and order a new trial. Appellant argued that the statements of Ross about admissions made by Delaplane that he knew about the robbery, the prior incident between Delaplane and Snodgrass and Delaplane's statement about wanting to punch Snodgrass constituted newly discovered evidence requiring a new trial. (Aug. 12, 2015 R. pp. 499-523). The judge denied the motion for a new trial finding that Appellant failed to meet the first and fourth elements required to grant a new trial based on after discovered evidence. (Aug. 12, 2015, R. pp. 531 – 534). The trial judge erred.

In State v. Caskey, 273 S.C. 325, 329, 256 S.E.2d 737, 738–39 (1979), the South Carolina Supreme Court wrote:

> While a motion for a new trial based on after-discovered evidence is addressed to the sound discretion of the trial judge, it is well settled that it may be granted only if the movant shows that the evidence upon which it is based:
>
> (1) Is such as would probably change the result if a new trial was had;
> (2) Has been discovered since the trial;
> (3) Could not by the exercise of due diligence have been discovered before the trial;
> (4) Is material to the issue of guilt or innocence; and,
> (5) Is not merely cumulative or impeaching.
>
> State v. Fowler, 264 S.C. 149, 213 S.E.2d 447 (1975); State v. Wells, 249 S.C. 249, 153 S.E.2d 904 (1967); State v. Mayfield, 235 S.C. 11, 109 S.E.2d 716, cert. den. 363 U.S. 846, 80 S.Ct. 1616, 4 L.Ed.2d 1728, reh.

den. 364 U.S. 857, 81 S.Ct. 36, 5 L.Ed.2d 81 (1959); State v. Clamp, 225 S.C. 89, 80 S.E.2d 918 (1954).

First, the statements by Ross meet the second, third and fifth elements required for a new trial. The statements were discovered after the trial and could not by the exercise of due diligence have been discovered before the trial, as correctly held by the trial judge. (Aug. 12, 2015, R. p. 529, line 15 – p. 530, lines 1-9). The statements were not merely cumulative or impeaching. The statement about the prior incident and Delaplane wanting to punch Snodgrass in the face goes to motive, especially in light of the fact that the injuries suffered by Snodgrass were to his face and head.

As to the first element, the statements probably would have changed the result if a new trial was had. The first trial ended in a mistrial because of a hung jury. In the second trial, unlike the first trial, Investigator Seifert equivocated about Delaplane's confession that he set up the whole robbery, although it was included in his written report. As to the fourth element, the statements were material to guilt or innocence because the State's case was based on the statements of Delaplane and Perez and the fact that Appellant was at the movie theatre on the night in question and more closely matched the description given by Snodgrass.

The trial judge questioned why Delaplane would blame Appellant stating, "And I offer that for this reason, if Mr. Delaplane were making this up you would think that he would choose somebody other than a schoolmate, get a stranger or just create a straw person out there somewhere rather than point to somebody he knows and get involved in that regard." (Aug. 12, 2015, R. p. 531, line 21 – p. 532, lines 1-2). Appellant admitted being at the movie theatre and became a logical choice to blame when Delaplane and

Perez realized they needed to curry favor with the police in order to avoid charges of any kind for Delaplane and to receive a lighter sentence or reduction or dismissal for Perez who was charged with armed robbery. (R. p. 172, lines 11-15).

The trial judge also stated:

> So, I don't think that the new evidence in that regard rises to the level of third party guilt as being inconsistent with the guilt of Mr. McQuarters insofar as the armed robbery and the assault and battery charges are concerned. As between Mr. Delaplane and Mr. McQuarters, Mr. McQuarters is the only one who meets the description and is consistent with the story Mr. Snodgrass and Perez said about him. So, finding that those two elements have not been met I must respectfully deny your motion to vacate the conviction and order a new trial.

(Aug. 12, 2015 R. p. 533, line 24 – p. 534, lines 1-10). The trial judge erred, as a matter of law, in applying the third party guilt analysis requiring the new evidence to be inconsistent with the guilt of Appellant. Appellant was not necessarily arguing that Delaplane was the robber. Appellant simply denied that he was the robber, as testified by Delaplane and Perez. In order to grant a new trial based on after discovered evidence the new evidence is not required to be inconsistent with guilt. The new evidence must simply be material to guilt or innocence. Based on the specific facts of this case, where the State's case was based on the testimony of Delaplane and Perez, the new evidence in regard to the prior incident and the statements made by Delaplane is material to Appellant's guilt or innocence.

In determining materiality in the context of the non-disclosure by the prosecution of a promise of leniency the United States Supreme Court in Giglio v. United States, 405 U.S. 150, 153–54, 92 S. Ct. 763, 766, 31 L. Ed. 2d 104 (1972), wrote:

> Thereafter Brady v. Maryland, 373 U.S., at 87, 83 S.Ct., at 1197, held that suppression of material evidence justifies a new trial 'irrespective of the

> good faith or bad faith of the prosecution.' See American Bar Association, Project on Standards for Criminal Justice, Prosecution Function and the Defense Function s 3.11(a). When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule. Napue, supra, at 269, 79 S.Ct., at 1177. We do not, however, automatically require a new trial whenever 'a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict . . ..' United States v. Keogh, 391 F.2d 138, 148 (CA2 1968). A finding of materiality of the evidence is required under Brady, supra, at 87, 83 S.Ct., at 1196, 10 L.Ed.2d 215. A new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . .' Napue, supra, at 271, 79 S.Ct., at 1178.

In United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383, 87 L. Ed. 2d 481 (1985) the Court wrote:

> We find the Strickland formulation of the Agurs test for materiality sufficiently flexible to cover the "no request," "general request," and "specific request" cases of prosecutorial failure to disclose evidence favorable to the accused: The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

Although the present case involves a motion for a new trial based on after discovered evidence rather than a Brady non-disclosure violation, the definition of materiality in these cases supports the materiality element of the new evidence in the present case. The new evidence went to Delaplane's credibility and there is a reasonable probability that had the evidence been introduced at trial, the result of the proceeding would have been different. As discussed above, the first trial ended in a mistrial because of a hung jury. In the second trial, unlike the first trial, Investigator Seifert equivocated about Delaplane's confession that he set up the whole robbery, although it was included in his written report. The State's case was based almost entirely on the testimony of Delaplane and Perez and their

credibility was a critical factor for the jury to determine. The new statements from Ross regarding the prior incident between Delaplane and Snodgrass, the statement Delaplane made about punching Snodgrass and his admission are material to guilt or innocence.

The trial judge erred in refusing to grant a new trial based on after discovered evidence. The statements made by Ross would probably change the result if a new trial was granted, the statements were discovered after the trial, the statements could not have been discovered before trial by the exercise of due diligence, the statements are material to the issue of guilt or innocence and the statements are not merely cumulative or impeaching.

CONCLUSION

Based on the above argument, Appellant's conviction and sentence should be reversed and the case remanded for a new trial.

Respectfully submitted,

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of January, 2017.

CERTIFICATE OF COUNSELPRIVATE

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."

January 17th, 2017

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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 William F. Schumacher, IV, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201,this 17th day of January, 2017.

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
This 17th day of January, 2017
Christian Ford (L.S.)
Notary Public for South Carolina
My Commission Expires: March 1, 2026