STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Eugene C. Griffith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

YUL GRAHAM,

APPELLANT.

APPELLATE CASE NO. 2017-000205

INITIAL BRIEF OF APPELLANT

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2.

Did the trial court err in charging the jury on the presumption of inference pursuant to S.C. Code Section 16-13-120 and in allowing the solicitor to argue the presumption of inference in his closing argument to the jury which was prejudicial to Appellant Graham because the targeted items were not concealed?

3.

Did the trial court err in allowing Appellant Graham's statements made during the investigation by Officer Yarborough to be introduced at trial when the officer admitted that he did not give the Miranda rights to Graham although the officer said that Graham was in investigative detention at the time?

STATEMENT OF THE CASE

In August 2015, the Lexington County Grand Jury indicted Yul Graham on the charge of shoplifting with property enhancement based on two prior shoplifting offenses. On January 25-26, 2017, Appellant Graham proceeded to trial before the Honorable Eugene C. Griffith, Jr. and a jury. Appellant Graham was represented by David M. Mauldin, and the state was represented by H. Franklin Young III. Tr. 1. The jury found Graham guilty as charged. Tr. 166, ll. 25 – Tr. 167, ll. 8. The trial judge sentenced Appellant Graham to seven years suspended upon the service of three years and three years probation. Tr. 171, ll. 19 – 25. The following day, defense counsel moved for a new trial based on all of his prior motions and objections. The judge denied the motion. Tr. 173, ll. 11 – Tr. 174, ll. 8. Trial attorney filed a notice of appeal. This appeal follows.

STATEMENT OF THE FACTS

On June 21, 2015, Irving Lionel Lewis was managing the Bi-Lo store on Augusta Road in West Columbia. He observed people walking around the store when he came into work as the store was open twenty-four hours at that time. He saw a man in a motorized handicap shopping cart at the seafood freezer. As Lewis watched, he saw the man take several items from the seafood freezer and place them in an empty bag that was in the motorized cart. Tr. 72, ll. 9 – Tr. 74, ll. 24.

The man picked up shrimp according to Lewis and put them in the bag. Lewis then kept an eye on the man and watched "from afar." The man was picking up other items as he went through the store which he just placed in the cart. Lewis could not tell exactly what was in the bag but could tell there were at least two packages in the bag due to the size of the bag. Lewis could see the one bag and the other items loosely arranged in the cart. The man then proceeded to checkout in the front of the store. Lewis saw the man go through checkout and then into the vestibule just before going through the doors into the outside. Tr. 75, ll. 1 – Tr. 76, ll. 22.

Lewis stopped the man inside the vestibule because the man had passed "all points of sale" at that time. When Lewis asked the man for a receipt for the items in the bag that never left the cart, the man told him that he had purchased those items from the Garner's Ferry Bi-Lo Store. Lewis then went into the bag and pulled the items out which were two bags of shrimp and crawfish. The items were still frozen. Tr. 80, ll. 3 – Tr. 82, ll. 23.

Lewis gave the man the option to pay for those items since he did not have a receipt. Lewis also told him that Lewis saw the man pull the items from the freezer. The man refused to pay for the items although the man had a large amount of money with him. Lewis had someone call the police, and Officer Christopher Yarborough arrived within about three minutes. The

man remained seated during this time and did not try to leave. Tr. 83, ll. 1 – Tr. 84, ll. 7; Tr. 41, ll. 2 – 9.

When Officer Yarborough arrived, Lewis told him what he had observed and all that happened. Graham was present during this time according to Lewis. Once the officer arrived, Lewis said the man offered to pay for the items. However, Lewis decided to still prosecute since the man would not pay before the officer came. Tr. 84, ll. 2 – Tr. 85, ll. 8.

Officer Christopher Yarborough with the West Columbia Police Department received the call from Bi-Lo at 9:50 in the morning and arrived at the store within about one and a half minutes. He saw Lewis and Graham in the vestibule. Graham was seated in a motorized scooter in the vestibule right in front of Lewis. Tr. 91, ll. 16 – Tr. 93, ll. 25.

The officer spoke with Lewis first to hear his version of what happened. Then he talked with Graham to hear his side of the story. Graham told Officer Yarborough that he had been accused of stealing from Bi-Lo but that he had bought the items in question from the Garners Ferry Bi-Lo. According to Officer Yarborough, Graham spoke with Lewis most of the time and did say that he wanted to pay for the items. The officer also heard Graham say to Lewis that he did it to "try to get one over on him." Tr. 94, ll. 1 – Tr. 96, ll. 24.

There was a store video but the officer did not ask for it because he said that "Lewis was the video." Tr.97, ll. 5 – 20. Following Graham's side of the issue, Officer Yarborough took him into custody for shoplifting the fifty dollars' worth of frozen food according to the Bi-Lo employees. Tr. 97, ll. 21 – Tr. 98, ll. 25.

Officer Yarborough stated that he did not read any Miranda rights to Graham because he just wanted to get his side of the story, He did not know at that point that he was going to arrest

Graham. Graham did not ask for a lawyer and was very cooperative. Tr. 100, ll. 1 – Tr. 103, ll. 24.

Appellant Graham did testify at trial that he worked as a barber and had been standing all week, and his feet hurt. He also had diabetes and had nerve pain in his legs and feet. That was the reason he chose to use a motorized shopping cart at Bi-Lo. When he entered the Bi-Lo store, he saw a bag in a regular shopping cart. He took the bag but did not look in it. He said it was just like finding money on the street so he kept it. Tr. 110, ll. 1 – Tr. 112, ll. 2; Tr. 119, ll. 1 – 22.

He proceeded to buy the items he needed such as yellow rice, string beans and water. He saw Lewis and asked him where the rice was located. Graham was riding past the frozen food counters when he saw Lewis and asked him. Tr. 112, ll. 1 – 25.

Graham then went to checkout and paid for the items he went to buy. The bag that he picked up from the other cart was in the basket on his motorized cart with his other items when he went through checkout. The cashier saw the buggy and the person bagging the items was in front of Graham's buggy. They could have seen the bag because it was clearly there in Graham's buggy.

The cashier let him ride on through after check out and after he paid. Tr. 111, ll. 1 – 25.

Graham was leaving the store and had gone into the vestibule when he saw Lewis and Officer Yarborough who stopped him. Lewis, the manager, asked him for a receipt and Graham told him that he did not have a receipt for the bag because it was already in a buggy. Graham said that he offered to pay for the items in the bag "if it's such a big deal." Graham had money on him so he could have paid. Tr. 114, ll. 1 – Tr. 115, ll. 12.

According to Appellant Graham, he "was not intentionally trying to steal anything from the store." The bag was already in another cart. He admitted that he was going to keep the bag. He denied saying he was trying to "get over on anybody." Tr. 115, ll. 13 – Tr. 116, ll. 8.

On cross-examination, Graham said he had about $470 on him so he had adequate funds to pay for the items. Tr. 120, ll. 17 – 23. Graham denied opening any doors on the seafood aisle, and denied telling Lewis that he purchased the items in the bag at the Garner's Ferry Store. He said that he did not say to anyone that he was trying to get something over on the store or anyone. Tr. 123, ll. 3 – Tr. 125, ll. 7.

A pretrial Jackson v. Denno, 378 U.S. 368 (1964), hearing was held to determine the admissibility of the statements Graham made to Officer Yarborough. The officer admitted that he did not read Graham his Miranda rights although he said that Graham was in investigative detention when the officer started asking Graham questions. Officer Yarborough admitted that Graham was not free to leave. Tr. 53, ll. 7 – Tr. 54, ll. 15.

Officer Yarborough said that Graham told him he had been accused of shoplifting and that he bought the items in question from the Garners' Ferry Bi-Lo. Graham also said that he did it because he thought he "could get one over on him" but Officer Yarborough testified that that statement was made to Lewis and was not directed to Officer Yarborough. Tr. 54, ll. 16 – Tr. 57, ll. 17.

Defense counsel argued that any statements made to Officer Yarborough after the officer placed Graham in investigative detention were made in violation of Miranda. He argued that the statements should not be admitted because they would be in violation of the Fifth and Sixth amendments of the Constitution. Tr. 57, ll. 23 – Tr. 58, ll. 22.

The judge ruled that all of Graham's statements were voluntarily made during the "gathering of information in an attempt to make a decision to place him under arrest or not." The judge said all of the statements were "fair game under the constitution." Tr.57, ll. 23 – Tr. 60, ll. 24. Defense counsel argued that the officer had said Graham was placed in investigative detention after the officer spoke with Lewis. The judge responded: "It doesn't really matter when he's placed in investigative detention; the statement was made to Mr. Lewis." The judge told defense counsel that his record was protected. Tr. 61, ll. 1 – 21.

During the trial, when asked if he remembered Graham saying that he was trying to get one over on him, Lewis responded:

> I didn't hear him say that to me, no, I did not.

Tr. 90, ll. 4 – 24.

When asked if he stayed in the area where Officer Yarborough was, Lewis responded that he remained "somewhat in that proximity," but he was not "right there up on the officer." He said that people were coming in and out of the store and he was still trying to run the store. Tr. 90, ll. 4 – 24.

During Officer Yarborough's testimony at trial, defense counsel objected based on his prior objection when the officer began to testify as to what Graham said during the officer's investigation. The judge told counsel: "Your objection is noted for the record. Overruled." Tr. 94, ll. 17 – Tr. 96, ll. 24.

A charge conference was held where the judge told the two parties that there were three potential shoplifting instructions. The solicitor then said that the inference portion about concealing under the statutory provision in Section 16-13-120 was applicable in Graham's case,

and that he intended to cover those in his closing. He said: "It's a permissible inference based upon the concealment and I intend to cover that in my closing." Tr. 130, ll. 8 – 25.

Defense said he objected to the inference charge because it was "an improper charge on the facts." Counsel argued that the facts in Graham's case did not support the inference charge because the evidence in question –the bag—was not concealed. He argued that the bag was out in the open the whole time on top of the cart even when Graham went through the checkout line. The bag was not concealed. Even Lewis said he saw the bag. Tr. 131, ll. 1 – Tr. 133, ll. 22.

The trial judge said that he was inclined to give the inference from the statute. Defense counsel maintained his objection to that, and "took exception now." Tr. 133, 24 – Tr. 134, ll. 2.

During his closing argument to the jury, the solicitor told the jury that there was a permissible inference that the jury could consider in this case. The solicitor said that it was permissible to infer that any person willfully concealing unpurchased goods has concealed the article with the intention of converting it to his own use without paying the purchase price which was within the meaning of the shoplifting statute. The solicitor continued to explain that it was permissible to infer that the finding of the unpurchased goods concealed upon the person or among the belongings of the person was evidence of willful concealment. He argued that the jury could infer that Graham had concealed the unpurchased goods among the things that he had purchased. Tr. 139, ll. 14 – Tr. 141, ll. 22.

Later in his final closing argument, the solicitor told the jury that his job was to present evidence, and the jury's job "was to decide on the truth of it." He went on to say: "It's important that your verdicts be the truth." Defense counsel objected on burden shifting. The judge told the solicitor: "Don't shift the burden." Tr. 147, ll. 1 – 23.

The solicitor then immediately said to the jury: "All we're doing here today is making a determination of what's the truth for you, that's it." Defense counsel objected again on burden shifting. The judge told the solicitor that there was a comment in the Beaty[1] case that "they're going to answer the questions of fact which was a better way to word it." The solicitor said that he would change that to the facts which he did at that moment. Tr. 147, ll. 24 – Tr. 148, ll. 20.

Just a short time later, for the third time, the solicitor told the jury again: "You have to decide what's the truth." Defense counsel objected again on burden shifting. This time the judge ruled: "That's not. I sustain that----I overrule that objection. He's arguing proper." Tr. 149, ll. 9 – 17.

In his charge to the jury, the trial judge charged the jury on the permissible inference. He said:

> If the defendant willfully concealed unpurchased goods ot merchandise on the premises or outside the premises of the store or on the defendant's person or among his belongings or on the person of another or among the belongings of another, you may consider this as evidence that the defendant concealed the merchandise with the intent to convert it to his own use without paying for it.

Tr. 161, ll. 16 – Tr. 162, ll. 2.

At the close of the charge, defense counsel told the court that he took exception to 16-13-120 about the concealment of the items and the inference being charged. The judge that his objection was noted but the judge had already made that ruling so counsel's objection was protected. Tr. 164, ll. 24 – Tr. 165, ll. 7.

The jury sent a note to the judge during deliberations asking for a definition of shoplifting. The judge put on the record that he had inquired with the lawyers that they had no

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[1] State v. Beaty, Op. No. 27693, (Supreme Court filed December 29, 2016; Rehearing granted March 24, 2017; oral argument June 15, 2017).

objection to the judge sending the entire jury instruction in writing back to the jury. Tr. 166, ll. 4 – 11.

The jury found Appellant Graham guilty as charged of shoplifting. Tr. 166, ll. 24 – Tr. 167, ll. 8. The judge sentenced Appellant Graham to seven years confinement suspended upon the service of three years and three years' probation. Tr. 171, ll. 18 – 25.

ARGUMENT

I.

The trial court erred in overruling defense counsel's objection to the solicitor unconstitutionally shifting the burden of proof to Appellant Graham in his closing argument when the solicitor told the jury that they had to decide what was the truth which was the solicitor's third directive to the jury to determine the truth which was prejudicial to Appellant.

In State v. Needs, 333 S.C. 134, 155-156, 508 S.E.2d 857, 867-868 (1998), the Supreme Court urged trial judges to avoid using any "seek" language. The Court emphasized that such "seek the truth" language was unnecessary, and ran the risk of unconstitutionally shifting the burden of proof to the defendant. Id.

In State v. Aleksey, 343 S.C. 20, 26-29, 538 S.E.2d 248, 251-253 (2000), the Supreme Court repeated its warning that trial courts should avoid using any "seek the truth" language. However, the Supreme Court in Aleksey noted the "seek" language was used in that case as an instruction on witness credibility. Id. The "seek" language did not appear in either the reasonable doubt or circumstantial evidence portion of the instruction. Id. The Court in Aleksey therefore found there was not a reasonable likelihood that the jury applied the challenged instruction in a manner inconsistent with the state's burden of proof beyond a reasonable doubt. Id.

The Supreme Court in State v. Daniels, 401 S.C. 251, 255-256, 737 S.E. 473, 475 (2012) considered a similar jury instruction that "whatever verdict you reach will represent truth and justice for all parties that are involved in this case." Although the issue was not preserved, the Supreme Court instructed trial judges "[to] remove any suggestion from his general sessions charges that a criminal jury's duty is to return a verdict that is 'just' or 'fair' to all parties. Such a charge could effectively alter the jury's perception of the burden of proof, substituting justice and fairness for the

presumption of innocence and the State's burden to prove the defendant's guilt beyond a reasonable doubt." Id.

In State v. Beaty, Op. No. 27693 (S.C. Sup. Ct. filed December 29, 2016 rehearing granted March 24, 2017; oral argument June 15, 2017), the Supreme Court **again** held the trial judge's remarks that a trial is "a search for the truth in an effort to make sure that justice is done" and that the jury's role is to "search for the truth, or to find the true facts or to render a just verdict" were error. Id. The Court explained: "These phrases may be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict it believes best serves the jury's perception of justice." Id. Moreover, the Supreme Court repeated its caution to trial judges that they should "avoid . . . any [terms] that may divert the jury from its obligation in a criminal case to determine, based solely on the evidence presented, whether the State has proven the defendant's guilt beyond a reasonable doubt." Id.

The jury's function is not to search for the truth. However, the jury's role of seeking proof is fundamentally different from truth and justice. The jury's function is to determine whether the state has proved the defendant's guilt beyond a reasonable doubt. The solicitor's remarks put in the jurors' minds it was their duty to "seek the truth" and render a "just verdict," rather than do what the Constitution requires, which is to determine if the state met its burden beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307 (1979).

Although these cases pertain to the remarks and rulings of the trial judge, the same rule should apply to the state as well. The solicitor is an officer of the court and represents authority to the jurors as he prosecutes criminal charges. The solicitor should be bound by this same ruling as found in the above named cases regarding the "seek the truth" language in order to maintain

consistency in the legal system and to prevent confusion among jurors. The jurors were confused as shown by the only question the jurors had during deliberations which was the definition of shoplifting.

ARGUMENT

II.

The trial court erred in charging the jury on the presumption of inference pursuant to S.C. Code Section 16-13-120 and in allowing the solicitor to argue the presumption of inference in his closing argument to the jury which was prejudicial to Appellant Graham because the targeted items were not concealed.

South Carolina Code Section 16-13-120 provides:

> It is permissible to infer that any person wilfully concealing unpurchased goods or merchandise of any store or other mercantile establishment either on the premises or outside the premises of the store has concealed the article with the intention of converting it to his own use without paying the purchase price thereof within the meaning of Section 16-13-110. It is also permissible to infer that the finding of the unpurchased goods or merchandise concealed upon the person or among the belongings of the person is evidence of wilful concealment. If the person conceals or causes to be concealed the unpurchased goods or merchandise upon the person or among the belongings of another, it is also permissible to infer that the person concealing such goods wilfully concealed them with the intention of converting them to his own use without paying the purchase price thereof within the meaning of Section 16-13-110.

Section 16-13-110 (A) has three sub sections on when a person is guilty of shoplifting. Number (1) provides that a person is guilty if takes possession of or carries away or transfers to another person or area of store any merchandise of the store with the intention of depriving the merchant of the merchandise without paying the full retail value.

Number (2) provides that a person is guilty if he alters or transfers or removes the label or price tag and then attempts to purchase the item at less than the retail value with the intention of depriving the merchant of the full value of the item.

Number (3) provides that a person is guilty of shoplifting if transfers any merchandise from the container in which it is displayed to any other container with the intent to deprive the merchant of the full retail value.

This was the statute under which Graham was indicted along with Section 16-1-57 which allows for the enhancement of the sentence for a third or subsequent offense.

In State v. Wells, 282 S.C. 12, 316 S.E.2d 409 (1984), the Supreme Court held that the jury instruction that where the customer in the store conceals merchandise, a presumption arises that it was willful concealment, deprived the defendant of his right to due process of law. Wells was convicted of shoplifting under Section 16-13-110 for concealing on his person unpurchased merchandise from the Saluda Wine and liquor Store. The trial judge instructed the jury pursuant to Section 16-13-120 that finding unpurchased merchandise concealed on a person was *prima facie* evidence of shoplifting. Although Wells did not offer any evidence, the Supreme Court held that the fact that he did not "did not alter the probable prejudicial effect of the instructions."

The Court in Wells cited the case of State v. Burriss, 281 S.C. 47, 314 S.E.2d 316 (1984) which held that the statute which permits presumptions from accused's concealment of unpurchased goods of accused's intention of converting goods to his own use without paying purchase price was unconstitutional, and thus, should not be charged; when facts referred to in it are proved, and they should be considered along with all other evidence.

Although Section 16-13-120 no longer contains the words *prima facie,* and the judge in Wells also charged *prima facie,* the prejudicial effect is the same for Appellant Graham. The judge's instruction of Section 16-13-120 in Graham's case was not necessary because he was indicted under Section 16-13-110 for shoplifting. Any instruction to the jury on inference was prejudicial because the jury needed to determine on their own based on the evidence presented if

Graham was willfully concealing the goods. It was prejudicial and an unconstitutional violation of Graham's due process rights to a fair trial for the judge to have charged inference from Section 16-13-120. The jury was confused as shown by their only question which was for the definition of shoplifting again.

ARGUMENT

III.

The trial court erred in allowing Appellant Graham's statements made during the investigation by Officer Yarborough to be introduced at trial when the officer admitted that he did not give the Miranda rights to Graham although the officer said that Graham was in investigative detention at the time.

In Miranda v. Arizona, 384 U.S. 436 (1966), the United States Supreme Court ruled that when a suspect, who is in custody, is questioned by the police, his confession will be admissible against him only if he has received Miranda warnings. Three criteria must be met before Miranda is required:

1. The suspect must be in custody;
2. Miranda applies when the confession is the result of questioning ;
3. Miranda is required where the questioning and the custody are by law enforcement.

The United States Supreme Court also held in Miranda that although a suspect in a criminal investigation has no constitutional right to the assistance of counsel, a suspect subject to custodial interrogation has the right to consult with an attorney and to have counsel present during questioning, and that the police must explain this right to him before questioning begins.

In State v. Medley, 417 S.C. 18, 787 S.E.2d 847 (Ct. App. 2016), a driving under the influence (DUI) case, the Court of Appeals found that the defendant was subject to custodial interrogation at the time that he made the initial incriminating statement regarding his alcohol consumption, and thus Miranda warnings were required. The court wrote that whether a suspect is in custody for the purposes of Miranda, was determined by an examination of the totality of the circumstances, such as the location, purpose and length of interrogation, and whether the

suspect was free to leave; the custodial determination was based on whether a reasonable person would have believed that he was in police custody. Although the Court of Appeals found admitting the statements was error, the error was harmless.

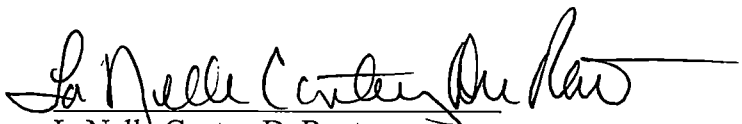
The Court, citing State v. Evans, 354S.C. 579, 582 S.E.2d 407 (2003), also found that the purpose of Miranda warnings was to apprise the defendant of the constitutional privilege not to incriminate himself while in the custody of law enforcement. In State v. Miller, 375 S.C. 370, 652 S.E.2d 444 (Ct. App. 2007), the Court of Appeals held that a statement obtained as a result of custodial interrogation was inadmissible unless the suspect was advised of and voluntarily waived his rights.

The trial court erred in admitting the statements made by Graham during the investigation by Officer Yarborough. By Officer Yarborough own admission, Graham was in investigative detention after the officer spoke with the store manager, Lewis. The officer stated that Graham was not free to leave. Tr. 53, ll. 7 – Tr. 56, ll. 18. Therefore, Miranda warnings should have been given. Officer Yarborough knew that Graham was a suspect in the shoplifting case after he talked to Lewis.

Although Officer Yarborough testified that Graham's statement that he did it to "get one over on Lewis," was said to Lewis, Lewis testified that he did not hear it. He was only in the proximity. Then it was only reasonable that Lewis was not close enough for Graham to have directed the comment to Lewis. It was only reasonable that the comment was made to Officer Yarborough. There was no testimony as to what questions the officer asked Graham. The admission of Graham's statements was a violation of his constitutional rights.

CONCLUSION

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



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 21st day of July, 2017.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Eugene C. Griffith, Circuit Court Judge

THE STATE,

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V.

YUL GRAHAM,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Yul Graham, #371260, at Evans Correctional Institution, 610 Hwy. 9 West, Bennettsville, SC 29512, this 21st day of July, 2017.

LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 21st day of July, 2017.

(L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.