

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Roger L. Couch, Circuit Court Judge

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

MACK SEAL WASHINGTON,

APPELLANT

APPELLATE CASE NO 2017-001111

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in failing to suppress statements by law enforcement during the audio-recorded interrogation of Appellant where the statements concerned improper opinion evidence and shifted the burden of proof to Appellant?

STATEMENT OF THE CASE

On September 12, 2016, a Charleston County grand jury indicted Appellant for burglary in the first degree (2016-GS-10-5383), malicious injury to personal property (2016-GS-10-5386), and obtaining goods by false pretenses (2016-GS-10-5387). R. * (indictments). The state, represented by Daniel Poulos, called the case for trial on April 17-18, 2017, before the Honorable Roger L. Couch and a jury. Tr. 1. Luke Malloy, III, represented Appellant. Tr. 1. The jury found Appellant guilty as charged. Tr. 307, ll. 14-25. Judge Couch sentenced Appellant to fifteen years' imprisonment for burglary and to ten years' imprisonment for each property crime offense. Tr. 316, ll. 13-16; R. * (sentence sheets). He ordered the sentenced to be served concurrently. Tr. 316, ll. 16-17; R. * (sentence sheets).

On April 21, 2017, Appellant served his notice of appeal. This brief follows.

ARGUMENT

The trial judge erred in failing to suppress statements by law enforcement during the audio-recorded interrogation of Appellant where the statements concerned improper opinion evidence and shifted the burden of proof to Appellant.

Relevant Facts

On August 21, 2015, Sarah Corbin arrived home to find that her interior laundry room door was damaged. Tr. 110, l. 7 – Tr. 111, l. 5. Corbin left the home, calling the police and her husband, Lawrence Collins. Tr. 111, ll. 6-13.

Upon receiving Corbin's call, Collins returned home. Tr. 115, ll. 10-19. Collins noticed the side door leading from outside into the garage had been damaged. Tr. 115, ll. 21-23; Tr. 116, ll. 23-25. Inside the garage, pressed against the side door was a stackable washer and dryer. Tr. 120, ll. 8-12; Tr. 120, ll. 19-22. The washer and dryer were damaged as well. Tr. 121, ll. 8-18. The unit had been pushed away from the side door. Tr. 121, ll. 15-18. Collins claimed a Husqvarna brand weed eater with a "chain saw on a stick" was missing from the garage. Tr. 125, ll. 7-15.

Collins also saw damage to the door leading from the garage into the house. Tr. 126, l. 18 – Tr. 127, l. 3. Collins claimed several items were missing from inside his home: "rifle, pistol, and change jar." Tr. 128, ll. 17-21. The rifle was sitting on an antique cabinet in the living room. Tr. 128, l. 22 – Tr. 129, l. 11. The pistol was taken from the closet in the master bedroom. Tr. 129, ll. 12-15. Additionally, the change jar was taken from the bedroom closet. Tr. 129, ll. 23-25.¹ Although Collins had "12, 15 guns" in the house, those were not stolen. Tr. 129, ll. 4-5; Tr. 129, ll. 18-22; Tr. 141, l. 21 – Tr. 142, l. 3; Tr. 167, ll. 19-24.

¹ Collins did not report the missing change jar to the police. Tr. 167, ll. 6-14.

Collins claimed he had owned the stolen rifle for four generations, and that he could recognize it on sight. Tr. 130, ll. 1-4.² Despite such alleged familiarity with the rifle, Collins told the police it was manufactured by Savage, but when a Winchester was recovered, he claimed it was the stolen gun. Tr. 130, ll. 5-18; Tr. 143, ll. 7-9; Tr. 166, ll. 12-22. In fact, on January 27, 2016, Collins met a police officer at a pawn shop in West Ashley where he claimed the pawned Winchester rifle was the one stolen from his home on August 21, 2015. Tr. 133, l. 23 – Tr. 134, l. 2; Tr. 143, ll. 19-23. Although the police told Collins to go to a pawn shop in North Charleston because a weed eater had been pawned, Collins did not go to the shop. Tr. 135, l. 20 – Tr. 136, l. 3; Tr. 143, l. 24 – Tr. 144, l. 4.

During the investigation, the police recovered a single fingerprint from the stackable washer and dryer. Tr. 159, l. 24 – Tr. 160, l. 8. When the latent print was loaded into AFIS, thirty possible matches were generated. Tr. 208, l. 20 – Tr. 209, l. 9. However, the fingerprint examiner received only one of those candidates to use for analysis. Tr. 209, ll. 10-12. The examiner opined that the latent impression “was created by the number 6 left thumb off the fingerprint card” associated with Appellant. Tr. 198, ll. 10-15.

After the police learned of the fingerprint analysis, Appellant became a suspect in the burglary. Tr. 236, ll. 16-24. However, neither Corbin nor Collins knew Appellant. Tr. 111, ll. 16-17; Tr. 136, ll. 14-16; Tr. 136, l. 25 – Tr. 137, l. 9. Thereafter, an officer searched a pawn shop database for Appellant’s name. Tr. 236, l. 25 – Tr. 237, l. 8. According to the officer, the search revealed that on August 21, 2015, Appellant “had pawned two items that were similar in make and model to what were stolen from the burglary.” Tr. 237, ll. 9-13. Those items were a Winchester rifle and a Husqvarna weed eater. Tr. 237, ll. 14-19. The police never obtained the

² Collins did not report to the police that the rifle had a “unique” engraving on the barrel. Tr. 167, ll. 1-3.

pawned weed eater, and the police never found the allegedly stolen pistol or change jar. Tr. 237, ll. 21-25.

On March 24, 2016, the police interrogated Appellant regarding the burglary. Tr. 241, ll. 5-6. During the interrogation, the officer offered his opinion and shifted the burden of proof to Appellant to prove his innocence. Prior to trial, defense counsel moved to redact the offending portions of the interrogation. Tr. 23, ll. 15-24; Tr. 24, ll. 3-11; R. * (Motion *in limine*); R. * (Court's Exhibit #1). Defense counsel argued the officer gave "opinions as to the truthfulness of" Appellant. Tr. 24, ll. 6-7. The officer repeatedly opined a fingerprint found in the burgled home belonged to Appellant. Tr. 25, ll. 8-10; Tr. 25, ll. 5-8. When the officer discussed the pawn tickets, the officer's statements were hearsay and improperly bolstered the testimony of the pawn shop dealers. Tr. 25, ll. 9-16. Most offensively, the officer's statements were "his opinion as to the ultimate question of fact." Tr. 25, ll. 17-20. Based on these reasons, defense counsel moved to redact the audio statement offered by the state. Tr. 25, ll. 20-21.

The judge agreed to redact certain portions of the audio, but left many offending portions for the jury to hear. The judge permitted the officer to say, "It's not possible because you pawned it the same day you broke into the house." Tr. 26, ll. 22-25. Additionally, the judge refused to redact the officer saying, "There's no ifs, ands and buts about it." Tr. 27, ll. 13-15. Repeatedly, the officer challenged how Appellant could be at work when his fingerprints were in the house and required Appellant to explain. Tr. 27, ll. 16-21. Most pointedly, the officer told Appellant that he would "have to explain why [his] fingerprints were at the house." Tr. 28, ll. 4-5. Additionally, the judge allowed the jury to hear the officer's opinion regarding Appellant's fingerprint being inside the house. Tr. 28, ll. 6-10. The ruling permitted the jury to hear the

officer's opinions regarding Appellant pawning items and offering, what the officer considered, unsatisfactory answers for the pawning of the items. Tr. 28, ll. 8-10.

Appellant preserved his objections when the evidence was offered by the state. Tr. 147, l. 2 – Tr. 148, l. 10; Tr. 240, ll. 19-25; State's Exhibit #33; State's Exhibit #41; R. * (Court's Exhibit #1).

Discussion

Burden-shifting

In State v. Brewer, 411 S.C. 401, 406, 768 S.E.2d 656, 658 (2015), this Court acknowledged “the propriety of law enforcement interrogation techniques, including misrepresenting the existing and strength of the evidence against an accused, as well as asking the accused to produce evidence voluntarily. This Court explained that “[s]uch matters are typically examined *in camera* when the trial court is making a preliminary determination as to the admission of a confession.” Id. “But such evidence will rarely be proper for a jury’s consideration.” Id. at 406, 768 S.E.2d at 659.

During Brewer’s interrogation, the “investigators frequently referenced *and quoted* many purported eyewitnesses to Brewer shooting both victims. This evidence was hearsay, offered for the sole purpose of proving the truth of the matter asserted, establishing Brewer’s guilt to all charges.” Id. at 406-407, 768 S.E.2d at 659 (emphasis in original). This Court implored trial courts and lawyers to exercise “caution” “in the admission of such evidence to ensure that all out-of-court statements are either ‘admissible for a valid nonhearsay purpose or as an exception to the hearsay rule in order to safeguard against an end-run around the evidentiary and constitutional proscriptions against the admission of hearsay.’” Id. at 407-408, 768 S.E.2d at 659 (quoting State v. Miller, 676 S.E.2d 546, 556 (N.C. 2009)). This Court reminded trial courts that

“the questions police pose during suspect interviews may contain false accusations, inherently unreliable, unconfirmed or false statements, and inflammatory remarks that constitute legitimate points of inquiry during a police investigation, but that would otherwise be inadmissible in open court.” Id. at 408, 768 S.E.2d at 659 (quoting Miller, supra). This Court held the officer’s insistence that Brewer prove his innocence during the interrogation video had “no place before the jury.” Id. (emphasis in original). This Court found it “chilling” to have “to *remind* the state that an accused is presumed innocent and that the state has the burden to prove guilt beyond a reasonable doubt.” Id. (emphasis added).

In the audio recording of Appellant’s interrogation, the officer challenged Appellant’s denial of guilt by insisting Appellant explain why his fingerprint was found inside the house and why he had pawned certain items. Repeatedly, the officer stated that *Appellant was required* to explain how his fingerprint was in the home. The officer’s multiple statements shifted the burden of proof to Appellant. The officer was the person who had to prove the case. As a representative of the state, it was the officer’s duty to marshal the evidence in the case. Appellant had no burden whatsoever; yet, the officer told him that he did. The officer’s improper statement regarding the burden of proof conveyed the improper burden to the jury.

Improper lay opinion

Pursuant to the South Carolina Rules of Evidence, a non-expert witness may offer opinion testimony in very limited circumstances.

If the witness is not testifying as an expert, the witness’ testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience, or training.

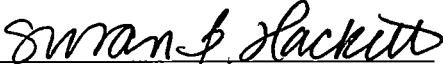
Rule 701, SCRE.

During the interrogation, the officer opined, among other things, that Appellant's fingerprint was found in the house, that Appellant had stolen the items that he pawned, that the items pawned were in fact stolen, and that Appellant's responses to the officer's interrogation were not satisfactory. In essence, the officer was offering his opinion regarding whether Appellant committed the burglary. His statements were not rationally based on his perception, but were based upon his opinions and speculation. The officer's opinions regarding the fingerprint found in the home, the person who pawned the items, the ownership of the pawned items, and the nature of Appellant's responses to the interrogatories were not helpful to a clear understanding of the testimony or a determination of a fact in issue. The officer lacked any special knowledge, skill, experience, or training to offer such an opinion. Whether the fingerprint found in the house belonged to Appellant was a matter for the jury. Whether Appellant's explanation that he pawned a gun that he bought from someone else was credible was a matter for the jury.

By failing to redact the audio recording of the interrogation to remove all improper burden shifting and opinion statements, the judge erred. The jury heard the officer shifting the burden of proof to Appellant when the officer required Appellant to explain the evidence and when the officer rejected Appellant's explanations. The jury heard the officer give his opinion regarding the quality of the evidence against Appellant, which he juxtaposed against the quality of Appellant's responses to his inquiries. The officer's statements invaded the province of the jury and shifted the burden of proof to Appellant. It was error to allow the jurors to hear those statements.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and remand for a new trial.


Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of November, 2017.

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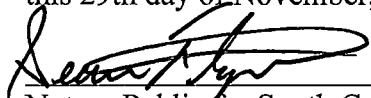
CERTIFICATE OF SERVICE

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 Mack Seal Washington, #196259, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 29th day of November, 2017.



Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 29th day of November, 2017.

 (L.S)
Notary Public for South Carolina
My Commission Expires: 10/30/2022.