STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Kershaw County

Honorable Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVID ONEIL VINCENT,

APPELLANT

APPELLATE CASE NO. 2017-001744

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in admitting Appellant's statement that he was at the scene of the alleged crime, where the law enforcement officer who took his statement asked incriminating questions in an environment where Appellant was not free to leave, without advising him of his constitutional rights.

STATEMENT OF THE CASE

A Kershaw County Grand Jury indicted Appellant on April 13, 2016 for assault and battery in the second degree. R. 262 On August 10, 2017, Appellant proceeded to trial before the Honorable Clifton B. Newman and a jury. R. 1. Curtis A. Pauling, III and Curtis R. Hutchinson appeared on behalf of the State. Jason D. Kirincich and James F. Lyon, V, represented Appellant.

The jury found Appellant guilty as charged. R. 262, ll. 11 – 18. The trial court sentenced Appellant to three years' incarceration, suspended to two years' probation after eight months.

This appeal follows.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006); State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001); State v. Wood, 362 S.C. 520, 608 S.E.2d 435 (Ct.App.2004). This court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000); State v. Amerson, 311 S.C. 316, 428 S.E.2d 871 (1993); State v. Landis, 362 S.C. 97, 606 S.E.2d 503 (Ct. App. 2004).

The trial judge determines the admissibility of a statement upon proof of its voluntariness by a preponderance of the evidence. State v. Miller, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct. App. 2007) (citing State v. Washington, 296 S.C. 54, 55, 370 S.E.2d 611, 612 (1988); State v. Smith, 268 S.C. 349, 354, 234 S.E.2d 19, 21 (1977)); State v. Arrowood, 375 S.C. 359, 365, 652 S.E.2d 438, 441 (Ct.App.2007). If admitted, the jury must then determine whether the statement was given freely and voluntarily beyond a reasonable doubt. Washington, 296 S.C. at 55–56, 370 S.E.2d at 612.

"Factual conclusions as to the voluntariness of a statement will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion." Arrowood, 375 S.C. at 365, 652 S.E.2d at 441; Baccus, 367 S.C. at 48, 625 S.E.2d at 220; State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001); State v. Kennedy, 333 S.C. 426, 429, 510 S.E.2d 714, 715 (1998); State v. Von Dohlen, 322 S.C. 234, 242, 471 S.E.2d 689, 695 (1996). "In criminal cases, appellate courts are bound by fact finding in response to preliminary motions where there has been conflicting testimony or where the findings are supported by the evidence and not clearly wrong or controlled by an error of law." State v. Asbury, 328 S.C. 187, 193, 493 S.E.2d 349, 352 (1997) (citing State v. Amerson, 311 S.C. at 320, 428 S.E.2d at 873); State v. Franklin, 299 S.C. 133,

138, 382 S.E.2d 911, 914 (1989). "When reviewing a trial court's ruling concerning voluntariness, this Court does not reevaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial court's ruling is supported by any evidence." Saltz, 346 S.C. at 136, 551 S.E.2d at 252; State v. Breeze, 379 S.C. 538, 543, 665 S.E.2d 247, 250 (Ct. App. 2008); Miller, 375 S.C. at 378–79, 652 S.E.2d at 448.

ARGUMENT

The trial court erred in admitting Appellant's statement that he was at the scene of the alleged crime, where the law enforcement officer who took his statement asked incriminating questions in an environment where Appellant was not free to leave, without advising him of his constitutional rights?

Background

Rosa Lee Vincent divorced Appellant on September 17, 2015. R. 41, ll. 14 – 15. In October 2015, she was working as a cosmetologist at Roxie Hart Salon. R. 41, l. 16 – R. 42, ll. 17. On October 2, 2015, she was working at the hair salon when she "heard someone screaming for someone to leave now." R. 54, l. 19 – R. 55, l. 4. She saw a woman named Ashley Frost pointing at Appellant and yelling at him to leave. R. 55, ll. 13 – 19. She did not see an altercation but saw Trisha Guy getting up off the floor. R. 56, ll. 11 – 17.

Trisha Guy testified that she saw Appellant in the salon and, while standing a few feet away, told him that he was not supposed to be there and should leave. R. 67, l. 18 – R. 68, l. 6. He had come in previously and informed the receptionist that he had an appointment. R. 130, ll. 10 – 16. Guy alleged that Appellant grabbed her and threw her. R. 68, l. 17 – R. 69, l. 19.

Appellant then "turned around and just casually walked out of the salon." R. 57, ll. 11 – 13. According to Ms. Vincent, law enforcement was called and responded. R. 59, ll. 21 – 24; R. 71, ll. 10 – 24. Guy was taken to the hospital where she provided a statement. Id.

Jackson v. Denno hearing

Penny Lloyd, an employee at the Camden Police Department, was the State's only witness at the Jackson v. Denno hearing. R. 14, l. 36 – R. 34, l. 5. On October 2, 2015, Lloyd

responded to the incident at Roxie Hart Salon in Camden. R. 15, l. 4 – R. 16, l. 13. Lloyd was told that Appellant was alleged to have thrown an employee to the floor. R. 17, ll. 4 – 16.

At the hair salon, Lloyd did not speak with the allegedly injured employee, Trisha Guy. R. 17, ll. 17 – 19. Ostensibly without speaking to Guy, Lloyd "initiated [arrest] warrants for Appellant." R. 17, l. 23 – R. 18, l. 8. On the evening of the alleged incident, according to Lloyd, Appellant learned of the arrest warrant(s) and "contacted another officer by phone." R. 18, ll. 1 – 8. That officer told Appellant that Lloyd would meet him at the Kershaw County Detention Center and confirmed that Lloyd had "warrants against [Appellant] for this incident." Id.

Specifically, Lloyd had a warrant for assault and battery in the second degree. R. 18, ll. 9 – 11. Lloyd then met Appellant at the Detention Center. Upon arriving, Lloyd noticed that Appellant was outside the Detention Center with family members. R. 18, ll. 15 – 23. Lloyd testified that the initial meeting between her and Appellant transpired as follows:

> I pulled in and I got out of my vehicle. And we approached each other pretty quickly. Mr. Vincent and I were familiar with each other from my position at the Police Department. And I think right away, I did feel comfortable enough, I looked at him and I said, What on earth is going on? What has happened here?

R. 19, ll. 9 – 16. Lloyd did not Mirandize Appellant at all, even though she was "acting on the warrant." R. 19, ll. 17 – 20; R. 20, ll. 5 – 6. Because Lloyd was unable to serve her own warrant, a sergeant had already been notified to send someone to the area to serve it. R. 20, ll. 7 – 13. It was unclear whether Appellant was aware of this policy.

When asked whether Appellant was in custody, Lloyd did not answer in the affirmative or negative, simply responding: "There were no handcuffs or anything on him. He knew that I likely had warrants for him." R. 19, ll. 21 – 23.

In response to Lloyd's two questions, Appellant apologized. R. 20, l. 19 – R. 22, l. 12. "He said something along the lines of he should not have gone there." Id. He also mentioned,

according to Lloyd, that "he didn't mean for anybody to get hurt." Id. Additionally, he supposedly told Lloyd that "he thought [Guy] had something in her hand when she approached him at the business and pointed and asked him to leave." Id. Appellant's statement was not reduced to writing, and Lloyd never interviewed him again regarding his statement. Id.

On cross-examination, Lloyd admitted that Appellant was turning himself in that night. R. 23, ll. 11 – 12. She admitted that Appellant's statement was not in her incident report. R. 23, ll. 20 – 25. Notably, Lloyd admitted **Appellant was not free to leave**:

> Q: Was Mr. Vincent free to leave? Could he have left if he wanted to?
>
> A: To my understanding, he was there to turn himself in to us. He knew that I had warrants. And he had - - it sounded like he had some conversation he wanted to have as well. As I said, he approached me as well when I got out of the vehicle. So if he would have tried to leave, **he probably would have been stopped**.

R. 25, l. 18 – R. 26, l. 1 (emphasis added).

At the conclusion of the pre-trial hearing, the trial court heard argument from both parties. R. 28, l. 21 – R. 34, l. 17. Defense counsel noted:

> [W]henever I asked Lieutenant Lloyd if [Appellant] if he was free to leave, after some reflection, she said, No, if he tried to leave, he would have been stopped. So I believe effectively he was in custody even though he was not in handcuffs. It would have been appropriate for her to Mirandize him at the time. She knew he was there to turn himself in. He was not leaving.

R. 29, l. 18 – R. 30, l. 1.

The trial court recalled only one of the questions Lloyd asked Appellant, "What on earth is going on?" but not the second question which was likely to yield potentially incriminating information, "What has happened here?" R. 30, l. 2 – R. 31, l. 16; R. 32, l. 15 – R. 33, l. 3. However, after hearing arguments from counsel, the trial court ruled "that the statements were not in response to a custodial interrogation" and denied the motion. R. 33, l. 18 – R. 34, l. 5.

Discussion

Lloyd testified in the jury's presence that Appellant called a law enforcement officer who was in her patrol car; Appellant was told that warrants were being taken out for his arrest. R. 165, ll. 7 – 21. Lloyd testified that Appellant was asked to meet at the Detention Center. Id. She felt like she had probable cause to obtain an arrest warrant following receipt of the initial written statement made by Guy. R. 178, l. 23 – R. 179, l. 2.

Lloyd testified before the jury that Appellant's verbal statement, although never recorded or reduced to writing, consisted of an admission that he was at the hair salon, that he should not have gone there, and that he did not want anyone to get hurt. R. 176, ll. 3 – 10. Lloyd was the State's last witness before the prosecution rested. R. 180, l. 4 – R. 181, l. 5. Defense counsel did not move for a directed verdict.

Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964) provides that a defendant in a criminal case is entitled to an evidentiary hearing on the voluntariness of statements made by the defendant prior to submission of such statements to the jury. Where there is conflicting evidence regarding the statements, the court must make a finding as to their validity. State v. Childs, 299 S.C. 471, 385 S.E.2d 839 (1989).

A defendant is entitled to a "reliable determination as to the voluntariness of his [statement] by a tribunal other than the jury charged with deciding his guilt or innocence." State v. Fortner 266 S.C. 223, 226, 222 S.E.2d 508, 510 (1976); State v. Miller, 375 S.C. 370, 381, 652 S.E.2d 444, 450 (Ct. App. 2007). "Once the trial judge determines that the statement is admissible, it is up to the jury to ultimately determine, beyond a reasonable doubt, whether the statement was voluntarily made." Miller, 375 S.C. at 383, 652 S.E.2d at 451 (citing State v. Von Dohlen, 322 S.C. 234, 243, 471 S.E.2d 689, 695 (1996)). "In South Carolina, the judge makes

this initial determination of voluntariness required by Jackson v. Denno." Fortner, 266 S.C. at 226, 222 S.E.2d at 510.

The test of admissibility of a statement is voluntariness. State v. Franklin, 299 S.C. 133, 382 S.E.2d 911 (1989). Any statement given freely and voluntarily without any compelling influence is admissible in evidence. Id., 382 S.E.2d at 912. Certainly, if a defendant is not "in custody" at the time he makes a statement to the authorities, Miranda warnings are not required. The Miranda safeguards are employed to insure the voluntariness of a defendant's statements once he is in custody. See Franklin, 382 S.E.2d at 912–913 quoting from Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980) ("The Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent.")

In State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007), the South Carolina Supreme Court instructed:

> In determining whether a confession was given "voluntarily," this Court must consider the totality of the circumstances surrounding the defendant's giving the confession. Schneckloth v. Bustamonte, 412 U.S. 218, 226, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). As the United States Supreme Court has instructed, the totality of the circumstances includes "the youth of the accused, his lack of education or his low intelligence, the lack of any advice to the accused of his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep." Id. (internal citations omitted). Furthermore, no one factor is determinative, but each case requires careful scrutiny of all the surrounding circumstances. Id.

Pittman, 373 S.C. at 566, 647 S.E.2d at 164. See also Arizona v. Fulminante, 499 U.S. 279, 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) (applying totality of the circumstances test to determine confession's voluntariness); State v. Myers, 359 S.C. 40, 47, 596 S.E.2d 488, 492 (2004) ("A determination whether a statement was 'given voluntarily requires an examination of the totality

of the circumstances.' " (quoting Von Dohlen, 322 S.C. at 243, 471 S.E.2d at 694–95)); State v. Peake, 291 S.C. 138, 139, 352 S.E.2d 487, 488 (1987) ("The test for determining the admissibility of a statement is whether it was knowingly, intelligently, and voluntarily given under the totality of the circumstances.") (citing State v. Rabon, 275 S.C. 459, 272 S.E.2d 634 (1980)); State v. Arrowood, 375 S.C. 359, 367, 652 S.E.2d 438, 442 (Ct. App. 2007) ("The trial judge's determination of the voluntariness of the statement must be made on the totality of the circumstances, including the background, experience, and conduct of the accused.").

Multiple factors are considered when deciding whether a statement was made voluntarily. In Miller, this court observed:

> The Supreme Court, in Withrow v. Williams, 507 U.S. 680, 113 S.Ct. 1745, 123 L.Ed.2d 407 (1993), set forth a non-exclusive list of factors which may be considered in the totality-of-the-circumstances analysis:
>
> > Under the due process approach ... courts look to the totality of circumstances to determine whether a statement was voluntary. Those potential circumstances include not only the crucial element of police coercion, Colorado v. Connelly, 479 U.S. 157, 167, [107 S.Ct. 515, 93 L.Ed.2d 473] (1986); the length of the interrogation, Ashcraft v. Tennessee, 322 U.S. 143, 153–154, [64 S.Ct. 921, 88 L.Ed. 1192] (1944); its location, see Reck v. Pate, 367 U.S. 433, 441, [81 S.Ct. 1541, 6 L.Ed.2d 948] (1961); its continuity, Leyra v. Denno, 347 U.S. 556, 561, [74 S.Ct. 716, 98 L.Ed. 948] (1954); the defendants maturity, Haley v. Ohio, 332 U.S. 596, 599–601, [68 S.Ct. 302, 92 L.Ed. 224] (1948) (opinion of Douglas, J.); education, Clewis v. Texas, 386 U.S. 707, 712, [87 S.Ct. 1338, 18 L.Ed.2d 423] (1967); physical condition, Greenwald v. Wisconsin, 390 U.S. 519, 520–521, [88 S.Ct. 1152, 20 L.Ed.2d 77] (1968) (per curiam); and mental health, Fikes v. Alabama, 352 U.S. 191, 196, [77 S.Ct. 281, 1 L.Ed.2d 246] (1957). They also include the failure of police to advise the defendant of his rights to remain silent and to have counsel present during custodial interrogation. Haynes v. Washington, 373 U.S. 503, 516–517, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963)[.]
>
> 507 U.S. at 693–94, [113 S.Ct. 1745].

> Appellate entities in South Carolina have recognized that appropriate factors to consider in the totality-of-circumstances analysis include: background, experience, and conduct of the accused; age; length of custody; police misrepresentations; isolation of a minor from his or her parent; threats of violence; and promises of leniency. See Childs, 299 S.C. at 475, 385 S.E.2d at 842 (background, experience, and conduct of the accused); In re Williams, 265 S.C. 295, 217 S.E.2d 719 (1975) (age); State v. Jennings, 280 S.C. 62, 309 S.E.2d 759 (1983) (length of custody); State v. Rabon, 275 S.C. 459, 461, 272 S.E.2d 634, 635 (1980) (police misrepresentations); State v. Smith, 268 S.C. 349, 355, 234 S.E.2d 19, 21 (1977) (isolation of minor); State v. Rochester, 301 S.C. 196, 200, 391 S.E.2d 244, 246 (1990) (threats of violence and promises of leniency).

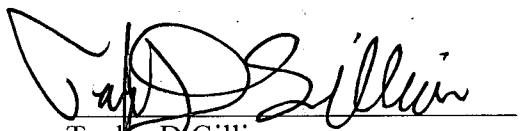
Miller, 375 S.C. at 385–86, 652 S.E.2d at 452.

Appellant was subjected to custodial interrogation by law enforcement. He was notified of the existence of an active arrest warrant in his name, and he was told to come to the Detention Center. As admitted by Lloyd, he was not free to leave. While he was constrained to that area, he was asked a question which was reasonably calculated to lead to a potentially incriminating response: "What has happened here?"

Based upon the totality of the circumstances, Appellant's statement was not given voluntarily. He was not given *any advice* at all from law enforcement regarding his constitutional rights. The detention lasted long enough for Lloyd to elicit incriminating information, namely that Appellant was at the hair salon and may have hurt someone. He also apologized R. 19, l. 24 – R. 21, l. 14. Appellant had no prior record at the time of trial. R. 232, ll. 3 – 4. He may have been unfamiliar with the investigative process and unaware of his constitutional rights. Although Lloyd testified that she was "comfortable enough" to speak with Appellant, there was no mention of whether Appellant was comfortable speaking with law enforcement or whether he felt forced. R. 19, ll. 9 – 16.

CONCLUSION

Based upon the foregoing, Appellant respectfully requests that this court reverse his conviction and remand for a new trial.



Taylor D Gilliam
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ATTORNEY FOR APPELLANT

This 20th day of November, 2018.

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, 20014, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

November 20, 2018

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