STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

C. Victor Pyle, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

STEPHANIA MURRAY,

APPELLANT

FINAL ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by refusing to allow the defense to impeach Investigator Weiner with the fact a "founded complaint" had been filed against him for false arrest since this was relevant evidence of Weiner's credibility since a false arrest entails making a false claim or report which involves dishonesty, the state further opened the door to this testimony with its apparent bolstering of Weiner's alleged excellent credentials, and the judge's ruling that the evidence against appellant was overwhelming was an erroneous reason to exclude this impeachment evidence?

STATEMENT OF THE CASE

Appellant was indicted by the Greenville County Grand Jury for the offense of strong-armed robbery. R. *. His case was called to trial on April 6, 2011 before the Honorable C. Victor Pyle and a jury. Elizabeth Wygul represented appellant. John Gregory was the assistant solicitor. R. 1.

The jury found appellant guilty. R. 148, ll. 2-5. Judge Pyle sentence appellant to fifteen years imprisonment. R. 151, ll. 8-24.

This appeal follows.

ARGUMENT

The court erred by refusing to allow the defense to impeach Investigator Weiner with the fact a "founded complaint" had been filed against him for false arrest since this was relevant evidence of Weiner's credibility since a false arrest entails making a false claim or report which involves dishonesty, the state further opened the door to this testimony with its apparent bolstering of Weiner's alleged excellent credentials, and the judge's ruling that the evidence against appellant was overwhelming was an erroneous reason to exclude this impeachment evidence.

Relevant Facts

On Sunday, March 16, 2008 Carol Wilborn went to the BI-LO on Pelham Road off of I-85 in Greenville. R. 49, ll. 8-22. Around 5:50 p.m. she went into the store, purchased her dishwashing detergent, and came back out. There were only about fifteen cars in the parking lot. R. 50, l. 1 – 51, l. 5.

Wilborn remembered she put the dishwashing detergent into the backseat of her car, and turned to open the driver's side door. She saw a car backing up in her direction and she was afraid the car would hit her or her open door. Wilborn remembered a man got out of the car and she thought he was going to apologize for almost hitting her. Instead, "he grabbed my arm here; my left arm which I still had my pocketbook [in]. I hadn't gotten it to the car yet and I had the strap still here, and he grabbed my arm and he squeezed it which pulled the strap loose and then he started pulling the strap." R. 52, ll. 5-16.

Wilborn started screaming and "I just kept looking at him saying why are you doing this." Other people in the parking lot began blowing their horn. R. 52, ll. 17-23.

Wilborn said she continued to fight for possession of her pocketbook. Wilborn testified that she continued to try to kick the man in the groin. She maintained the struggle went on for two to four minutes and the man finally wrestled her purse away, got back in his car, and drove away. Wilborn stated: "[I] thought I was really going to get hurt so eventually I had to let go, but he did drag me I'd say two to three feet."

Wilborn said her purse contained her credit cards, her cell phone, and about $50. R. 59, ll. 10-15.

Wilborn testified that later that day she got a telephone call from a woman in Greer telling her that they had "found my pocketbook later, thrown out, and gathered a lot of the stuff that were [*sic*] in it and [they had] taken it home." The caller's husband was a policeman in Greer and he had called the police department. R. 60, l. 9 – 61, l. 6. Wilborn said her cell phone and the stolen money were never recovered. R. 61, ll. 4-15.

The following day, March 17, 2008, Wilborn was shown a photographic lineup by Detective Weiner. She had described the man who stole her purse as a "dark, black male, about 6'2", short hair. His eyes were very red and he seemed very strong. His eyes just looked like he was almost angry." R. 54, ll. 6-15. Wilborn also offered that she was a nurse and had to "lift 300 pound people," so this robber was strong. R. 54, ll. 6-16. A photograph of the alleged victim's arms and injuries was entered into evidence. R. 56, l. 12 – 57, l. 2.

Wilborn said she picked appellant's photograph out of a lineup the following day. Her apparent certainty was "I will never forget those eyes." R. 62, l. 9 – 63, l. 4.

On cross-examination, Wilborn acknowledged she described the suspect as a tall black male with short hair and a red shirt. However, in a statement to Investigator

Weiner, on the day she was shown the lineup, she described the suspect as tall, rough looking, and wearing a red shirt. R. 65, l. 8 – 66, l. 1.

Appellant's former girlfriend, Barbara Randall, testified under subpoena as a state's witness. R. 83, ll. 16-21. The relevance of her testimony was that her 1996 Lexus, apparently spotted near the strong armed robbery, had been loaned to appellant on the day in question. R. 83, l. 16 – 85, l. 11.

Randall remembered Investigator Weiner telephoned her and they later had a three way conversation wherein Weiner interviewed appellant over the phone. Randall said the conversation lasted four to five minutes and appellant did not admit to any wrongdoing on the phone. R. 87, l. 1 – 90, l. 10.

This was significant because Weiner testified during the Jackson v. Denno, 378 U.S. 368 (1964) hearing, and at trial, that after Randall told him appellant had borrowed her car. Weiner claimed appellant confessed to him over the phone that: "I threw it [the purse] out the window. I asked him if he took anything and he said, 'just the cash, thirty or forty dollars.'" R. 100, ll. 7-23.

Weiner would also claim that months later, on September 24, 2008, while in the detention center, appellant said to him, without prompting: "If it were something like taking something from a store and running out with it, maybe, but not robbery, that's not me." R. 111, l. 13 – 112, l. 1. Although defense counsel made a pre-trial objection that this statement impermissibly put appellant's character at issue, and was not a statement against penal interest, counsel did not renew her objection before the jury. R. 111, l. 13 – 112, l. 1.

Defense counsel sought to impeach Weiner's rather strange telephone confession testimony with the fact that various complaints had been filed against him over the years. There was a "founded complaint" for false arrest, and Weiner had been counseled regarding his failure to follow proper procedures in the false arrest case. R. 94, l. 20 – 95, l. 20.

In refusing to allow this impeachment evidence, the judge cited the "overwhelming evidence" he thought there was against appellant, and he asked defense counsel what this evidence had to do with Weiner's truthfulness anyway. Defense counsel responded it went to Weiner's credibility and how he performed his job. The judge ruled: "I disagree with that in this case and I will not allow that line of questioning." R. 95, l. 21 – 96, l. 7.

Weiner then testified that appellant allegedly admitted to him over the telephone that he threw the purse out the window and that he took thirty or forty dollars from her victim's purse. R. 100, ll. 15-23. As stated, Weiner also maintained that appellant months later made the statement: "If it was something like taking something from a store and running out with it, maybe, but no robbery, that's not me." R. 111, l. 13 – 112, l. 1.

Discussion

As seen, Investigator Weiner's claim that appellant confessed to him over the telephone was directly contradicted by Barbara Randall. Even if it had not been refuted, it was a strange assertion that a person not in custody, in the protectiveness of his own home, and not promised anything or threatened, would confess over the phone.

Weiner also maintained during the Jackson v. Denno hearing, and later before the jury, that appellant, months later, said to him if the crime involved larceny from a store,

and running away, that he could be guilty of that crime, but he was not a robber. These were both unusual claims by Weiner, and a rightly skeptical juror could find they may have been false to secure a conviction.

Defense counsel correctly argued that Weiner's prior misconduct in effectuating a false arrest went to his credibility as a witness. This was a "founded complaint," and Weiner was counseled about it. A false arrest involves a false swearing, a false claim, or a false police report. All involve dishonesty.

Rule 608,(b) SCRE provides "while specific incidences of conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of a crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, *if probative of truthfulness or untruthfulness, being inquired into on cross-examination of the witness (1) concerning the witness' character of truthfulness or untruthfulness* ..." See Rule 608(b) SCRE.

Further, Rule 608(c) SCRE provides that "bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced."

Here, defense counsel sought to impeach Investigator Weiner with his prior misconduct in making a false arrest, and being counseled about it. The judge did not allow this testimony on the clearly erroneous grounds that he thought the evidence against appellant was overwhelming. Trial judges, respectfully, do not undertake a harmless error analysis when ruling on the admissibility of the evidence.

Appellant understands the judge can be right for the wrong reason but his ruling that this evidence did not go to credibility "in this case" is impossible to understand. He was simply wrong in his ruling.

Moreover, immediately after the trial judge refused to allow this impeachment of Investigator Weiner with his past false arrest transgression, the solicitor, in the presence of the jury, immediately built up Weiner's "excellent qualifications." Weiner said he had been an investigator for four years in the armed robbery unit, that he had a bachelor's degree from the Citadel, and that he received ongoing training. Weiner told the solicitor he had "logged over 800" cases in his tenure. Weiner said he followed the same procedure in this case as he had in every other crime he investigated. R. 96, l. 4 – 98, l. 24.

Weiner also told the jury that the first thing he did in every case was read "the report [and] I go over it with a fine tooth comb, talk to any people I need to talk to or things I need to follow up on to generate leads so I can identify a person of interest." R. 98, l. 18 – 99, l. 3. Weiner then alleged that appellant confessed to him on the telephone of committing the crime, and he claimed appellant later made a statement that, although stealing was part of crimes he committed, he did not commit robberies. R. 98, l. 12 – 112, l. 1.

This impeachment evidence was admissible under Rule 608(b)(1), SCRE because it concerned Investigator Weiner's character for truthfulness. It was also admissible under Rule 608(c), SCRE as evidence of his bias as a police officer since he had falsely arrested another person in the past.

Falsely arresting a person is a crime of dishonesty much worse than forgery or false pretenses since it falsely deprives another person of his freedom, and it involves false swearing and/or making a false police report. Cf. Weinstein's Evidence, § 608 (1994). Appellant had the right to show that Weiner was a biased police officer since he even would go to the extent of falsely arresting someone to further his own career. See, State v. Brewington, 267 S.C. 97, 226 S.E.2d 249 (1976)(Cross-examination in South Carolina is broad to show bias or untruthfulness, and the party opposing it should show why it is improper).

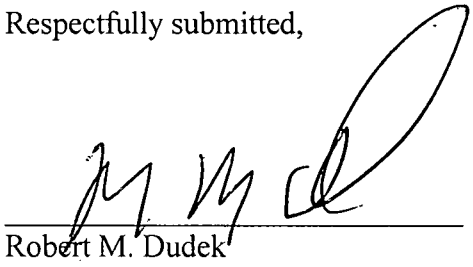
Further, the state opened the door to this evidence by presenting Investigator Weiner to the jury as an excellent experienced investigator who "went over everything with a fine tooth comb" in every case, including this one. See, Hammett v. State, 713 S.W.2d 102 (Tex. Cr. App. 1986); Cf. Lopez v. State, 928 S.W.2d 528 (1996). The Solicitor further argued Weiner's alleged excellent credentials in his closing argument and urged Weiner performed excellently in this case also. R. 132, l. 16 – 133, l. 22. Weiner was the state's star witness in appellant's case, and he was erroneously protected from legitimate cross-examination.

Weiner's allegation that appellant confessed over the telephone was strange indeed. Weiner's credibility was fair game, the state exploited it, and the jury had the right to know Weiner was a less than reputable police officer who would make a false arrest which – again -- obviously entails filing a false police report, and false swearing and making false claims by a law enforcement officer – the height of dishonestly and bias. See, State v. Brewington, 267 S.C. 97, 226 S.E.2d 249 (1976).

CONCLUSION

By reason of the foregoing argument, appellant's conviction should be reversed and this case remanded to the Greenville County Court of General Sessions for a new trial.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 8th day of May, 2012.

STATE OF SOUTH CAROLINA

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THE STATE,

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Stephania Murray states:

1. He is Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. He has reviewed the record of appellant's trial before Judge C. Victor Pyle, Jr., which was held on April 6, 2011, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for Stephania Murray.

Respectfully submitted,

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 8th day of May, 2012.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Anders Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, at P.O. Box 50666, Columbia, SC; and on Stephania Murray, #257335 at Kirkland Correctional Institution, this 8th day of May, 2012.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 8th day of May, 2012.

(L.S.)
Notary Public for South Carolina

My Commission Expires: May 16, 2021.