

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Deadra L. Jefferson, Circuit Court Judge

RECEIVED

DEC 11 2012

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

SASHA A. GASKINS,

APPELLANT

Appellate Case No. 2011-189166

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. Did the trial judge err in overruling Appellant's objection to the prosecutor's closing argument that all of the evidence presented by Appellant concerned mitigation of sentencing and was not relevant to guilt or innocence because the prosecutor's argument misstated the law, denying Appellant a fair trial and negating her defense?
- II. Did the trial judge err when she ruled that Appellant's expert could not testify as to Appellant's state of mind in violation of Appellant's right to present a complete defense and to a fair trial?
- III. Did the trial judge err when she held that Appellant's expert could not respond to a hypothetical question?

STATEMENT OF THE CASE

A Charleston County Grand Jury indicted Appellant for two counts of armed robbery and two counts of burglary in the first degree. R. 906. Culver Kidd and Dale Savage prosecuted Appellant before the Honorable Deadra L. Jefferson during the February 28, 2011 term of court. Kenneth Sowell represented Appellant. The jury returned its verdict finding Appellant guilty of all counts. R. 891 line 16 – R. 893 line 2.¹ On March 31, 2011, Judge Jefferson sentenced Appellant to eighteen years in prison on each count to run concurrently. R. 896 line 24 – R. 897 line 3.

Appellant filed a timely notice of appeal, and this brief follows.

¹ Appellant was tried before Judge Jefferson the week of February 28, 2011. Judge Jefferson held sentencing in abeyance. On March 31, 2011, Judge Jefferson sentenced Appellant. The sentencing transcript is paginated separately from the trial transcript. Therefore, Appellant will designate the trial transcript as “Tr.” and will designate the sentencing transcript as “Sent.”

STATEMENT OF FACTS

In February of 2010, Appellant was a freshman at the College of Charleston. R. 708 lines 1-3. Appellant was romantically involved with Stephen Francois at the time. R. 55 lines 17-19; R. 485 lines 18-19; R. 708 lines 8-17. On February 24, 2010, Appellant, Francois, Miguel Starks, Reginald Rice, and Breanna Bruster entered the home of Herbert Butler and stole property from him. R. 88 line 24 – R. 89 line 22; R. 261 line 23 – R. 264 line 1; R. 264 lines 2-15; R. 359 lines 10-24; R. 503 lines 1-10; R. 505 lines 2-7; R. 729 lines 12-18. Appellant knocked on the door and asked to use the phone. R. 23 lines 24-25; R. 248 lines 12-14; R. 249 lines 2-4; R. 353 lines 15-21; R. 603 line 12 – R. 604 line 5; R. 722 line 17 – R. 723 line 4. When the occupant agreed, Starks and Rice entered the home and presented their firearms. R. 24 lines 10-13; R. 24 lines 22-24; R. 249 lines 6-9 R. 353 lines 23-25; R. 354 line 1; R. 604 line 21- R. 605 line 2; R. 723 lines 6-10. Rice and Starks bound the occupants. R. 25 lines 2-15; R. 250 lines 8-12; R. 254 lines 1-21; R. 255 line 2 – R. 256 line 19; R. 354 lines 8-10; R. 606 line 4; R. 607 lines 1-6. Starks sexually assaulted the female occupant. R. 258 lines 8-15; R. 355 lines 6-7; R. 609 line 4 – R. 610 line 11; R. 610 lines 21-22.

On February 26, 2010, the group entered the home of Joshua Harpe and stole property from him. Appellant called Harpe and asked him to assist her with her vehicle. R. 521 lines 4-15; R. 638 lines 1-21; R. 738 line 24 – R. 739 line 5. When Harpe left his apartment to provide assistance, he was confronted by Francois, Starks, and Rice. R. 280 lines 10-18; R. 375 lines 11-14; R. 639 line 25 – R. 640 line 4. The three then forced Harpe to re-enter his apartment where they stole his property with the assistance of Appellant and Bruster. R. 112 lines 5-22; R. 115 lines 1-8; R. 119 lines 1-8; R. 120 lines 2-21; R. 121 line

24 - R. 122 line 5; R. 123 lines 3-10; R. 126 lines 7-11; R. 281 lines 10-18; R. 283 lines 1-4; R. 283 lines 4-6; R. 284 lines 5-17; R. 376 lines 3-18; R. 529 lines 21-25; R. 530 lines 18-21; R. 533 lines 11-23; R. 641 lines 18-19; R. 642 lines 19-20; R. 645 lines 14-15; R. 742 lines 18-24.

Appellant testified in her defense. Appellant testified that she was ordered by Starks to get out of the car at Butler's home. R. 720 lines 15-16. She further explained that Starks grabbed her by the arm, dragging her to Butler's house. R. 721 lines 20-23. Starks then instructed her to knock on the door and ask to use the phone. R. 722 lines 10-12. When Appellant refused, Starks responded "you are going to do it. If you don't do it I will kill you. I will kill you or I'll kill Stephen and I know where you guys stay." R. 722 lines 13-16. Appellant testified she did not have any options – she had to do what she was told or she would die or Stephen would die. R. 725 line 23 – R. 726 line 1. According to Appellant, when Starks dropped her off at her room on campus after the Butler robbery, he whispered her name, pointed the gun at her, told her not to mess up, and if she did, he would kill her. R. 733 line 20 – R. 734 line 2. Appellant testified she was afraid for her life and the lives of those she loved. R. 747 lines 17-20. This fear forced her to say yes to Starks' requests. R. 747 lines 21-24.

Additionally, Appellant presented the testimony of an expert witness who testified regarding the role of fear or duress on a person. Dr. Lewis Randolph Waid testified that the classic example of fear or duress is the "absolute threat of loss of life to either you or another individual or to family members." R. 678 lines 14-17. Dr. Waid explained that duress could provoke an "otherwise completely normal, reasonable, non-criminal person" to commit a

crime. R. 679 lines 3-15. According to Dr. Waid, duress forces a person to choose between two evils. R. 682 line 25 – R. 682 line 12.

Several witnesses also testified as to Appellant's good character and reputation for honesty and trustworthiness. Alvenes Barksdale testified that she knew Appellant through church and that Appellant had a wonderful reputation. R. 987 line 12 – R. 688 line 2; R. 689 lines 15-25. William Delaine testified Appellant was extremely honest and had a reputation in the community of being very intelligent and honest. R. 693 lines 20-21; R. 694 lines 14-21. Sa'Datrius Alston testified that Appellant was very honest and was respected for her honesty. R. 699 lines 13-20. Brenda Ligon, a former employer of Appellant, testified Appellant handled confidential materials and never broke confidentiality. R. 807 lines 9-11. Additionally, Appellant performed some bookkeeping for Ms. Ligon without incident. R. 807 lines 12-17. Appellant even elicited testimony from Francois as to her good character and intelligence. R. 176 line 7 – R. 177 line 16.

ARGUMENT

I. The trial judge erred in overruling Appellant's objection to the prosecutor's closing argument that all of the evidence presented by Appellant concerned mitigation of sentencing and was not relevant to guilt or innocence because the prosecutor's argument misstated the law, denying Appellant a fair trial and negating her defense.

During closing argument, the prosecutor argued to the jury that "[e]verything [Appellant] presented to you is mitigation" and as such was "something that should be considered as sentencing, not toward guilt." R. 852 lines 8-10. Appellant objected on the basis that the prosecutor was misstating the law. R. 852 lines 11-13. During a bench conference, Appellant argued the prosecutor told the jury that coercion was not to be considered by the jury. R. 852 lines 20-21. The judge ruled "[i]t's not an absolute defense. It's to be weighed by the jury. . . . He didn't misstate the law, he said it's something they can consider. They don't have to consider it." R. 852 line 22 – R. 853 line 1. Appellant argued that the prosecutor said "it has to be considered by the judge at sentencing." R. 853 lines 2-3. The trial judge ruled "[t]hat's not what he said. I'm reading exactly what he said." R. 853 lines 4-5. The judge then went on to say she was reading it verbatim and that the prosecutor did not say that. R. 853 lines 11-15. She overruled Appellant's objection.

The prosecutor also argued that the criminal justice system treated everyone the same and was not concerned with whether a person went to church and had a great reputation in the community. According to the prosecutor such evidence was "mitigation ... to be given to the judge at sentencing." R. 865 lines 10-16. The prosecutor instructed the jury that such evidence was for sentencing and not for the jury to consider. R. 865 lines 17-20.

Prior to the issuance of the jury instructions, the judge announced to the attorneys that she found an instruction on good character and reputation. She stated she was convinced she needed to give the instruction because the prosecutor argued that Appellant's good character could be considered in mitigation only, and that was not the law. The judge explained the jury could consider the character evidence in determining whether Appellant had committed the offense. R. 866 lines 9-19. Accordingly, the trial judge instructed the jury that "the defendant had presented evidence of her good reputation and character to show that it would be inconsistent with the defendant committing the crime." R. 872 lines 1-4. Further, the judge instructed that the jury "may consider testimony of the defendant's good character, along with all the other evidence in the case, in deciding whether or not the defendant committed the crime." R. 872 lines 5-10.

After the jury returned its verdicts of guilt, Appellant filed a Motion for Reconsideration and Motion for New Trial. One of the claims raised was that the prosecutor informed the jury that coercion was an issue to be determined during sentencing proceedings. R. 898. Appellant moved for a new trial because the prosecutor's argument and the trial judge's erroneous overruling of Appellant's objection to such argument deprived Appellant of a fair trial. R. 898. On April 5, 2011, the trial judge issued her order denying Appellant's motion. The trial judge determined Appellant's argument on this point was without merit. R. 902. The trial judge erroneously reasoned that when the prosecutor argued "Everything [Appellant] presented to you is mitigation. It's something that should be considered in sentencing, not towards guilt," the prosecutor was "[i]n essence" arguing that Appellant's character and reputation was mitigation and not an issue for the jury to consider. R. 902. The trial judge held "[t]he State *never* argued that coercion was

mitigation and should not be considered.” R. 902 (emphasis added). The trial judge concluded that any possible error in the prosecutor’s closing was addressed by the court’s instruction on good character and reputation. R. 902.

The prosecutor’s argument to the jury misstated the law and violated Appellant’s rights to a fair trial. As an initial matter, it is important to note that the trial judge misapprehended what the prosecutor said. Although the trial judge insisted the prosecutor argued the jury could consider the evidence offered by Appellant, the record speaks for itself – the prosecutor argued that “everything” offered by Appellant was inappropriate for determining guilt or innocence and was only to be considered by the judge for sentencing. Thus, the trial judge’s ruling during the trial and in her order denying the motion for new trial was based upon a misapprehension of the facts.

Appellant presented evidence on two separate legitimate independent grounds, either of which was a basis to find a reasonable doubt and acquit - that she acted under duress and evidence of her good character. Without question, the evidence of duress presented by Appellant was properly before the jury as a consideration of guilt or innocence. Although duress does not negate an element of the offenses charged, duress excuses the commission of the crimes. State v. New, 371 S.C. 523, 526, 640 S.E.2d 871, 873 (2007). Therefore, the evidence of duress presented by Appellant was a necessary consideration by the jury in determining whether Appellant was guilty of the charged offenses. The prosecutor’s repeated argument to the jury otherwise violated Appellant’s right to present a complete defense and to a fair trial.

In addition to negating Appellant’s evidence of an affirmative defense, the prosecutor’s argument instructed the jury that consideration of Appellant’s good character

was not appropriate for determining guilt or innocence. This argument was a misstatement of the law. Decades of clearly established law in South Carolina provide that

Evidence of good character and good reputation may in and of itself create a doubt as to guilt and should be considered by the jury, along with all the other evidence, in determining the guilt or innocence of the defendant.

State v. Green, 278 S.C. 239, 240, 294 S.E.2d 335, 335 (1982); see also State v. Lyles, 210 S.C. 87, 92, 41 S.E.2d 625, 627 (1947); State v. Harrison, 343 S.C. 165, 539 S.E.2d 71 (Ct. App. 2011). The prosecutor misstated the law to the jury and the trial judge failed to correct the prosecutor's misstatement, and in fact, overruled Appellant's objection. Although the trial judge later informed the attorneys that she would issue a jury instruction regarding consideration of good character evidence, this act did not cure the prosecutor's error or the trial judge's previous erroneous ruling. See State v. Perry Smith, 290 S.C. 393, 395, 350 S.E.2d 923, 924 (1986). Even if this Court determines the instruction cured the prosecutor's error, it only addressed half of the error as it only concerned the evidence of good character. The prosecutor directed his argument at "everything" submitted by Appellant, which included evidence of her good character and duress.

II. The trial judge erred when she ruled that Appellant's expert could not testify as to Appellant's state of mind in violation of Appellant's right to present a complete defense and to a fair trial.

Prior to the start of trial, Appellant moved for a continuance to permit the retention of a psychiatrist to evaluate Appellant to aid in presenting her defense of duress. R. 2 lines 1-4; R. 4 lines 3-16; R. 4 line 21 – R. 5 line 7; R. 6 line 4 – R. 7 line 1; R. 7 lines 5-9; R. 12 lines 2-5. The state objected to the presentation of expert testimony. R. 7 lines 2-4; R. 14 lines 8-11. The trial judge determined that the expert “would be able to talk about the effects of [duress or stress on the average person] in general, but that expert would not be able to say that on this particular event that’s how your client would have reacted.” R. 14 lines 16-21. Thus, the court concluded it was unnecessary for an expert to evaluate Appellant. R. 14 lines 23-24. The judge held the expert could “testify as to the effect of stress, duress or threats on a person.” R. 14 line 24 – R. 15 line 2.

The state again objected. R. 17 line 24 – R. 18 line 1. The trial judge ruled it was permissible for Appellant to present expert testimony on the effects of threats on a person in general, but not as applied to her. R. 18 lines 2-6. Specifically, the judge ruled the expert could not testify that Appellant was under duress that day and could not testify as to the effects that duress would have had on her on that particular day. R. 18 lines 9-12.

Appellant's defense at trial was that she was under duress due to threats by a co-defendant. In order to establish duress, the evidence must show “the degree of coercion must be present, imminent, and of such a nature as to induce a well-grounded apprehension of death or serious bodily harm if the act is not done.” State v. Benjamin, 345 S.C. 470, 475 n.3, 549 S.E.2d 258, 260 n.3 (2001); see also State v. Rocheville, 310

S.C. 20, 25, 425 S.E.2d 32, 35 (1993); State v. Robinson, 294 S.C. 120, 363 S.E.2d 104 (1987). Duress is not a defense “if there is any reasonable way, other than committing the crime, to escape the threat of harm.” Benjamin, 345 S.C. at 475 n.3, 549 S.E.2d at 260 n.3. Duress excuses the commission of a crime but does not negate any element of the offense. New, 371 S.C. at 526, 640 S.E.2d at 873. Additionally, Appellant had the burden of proving she acted under duress by a preponderance of the evidence. Id.

The Rules provide that “[t]estimony in the form of an opinion ... otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.” Rule 704, SCRE. The trial judge’s ruling that the expert could not testify as to Appellant’s state of mind because it concerned the ultimate issue in the case was clearly wrong. See State v. Wilkins, 305 S.C. 272, 276, 407 S.E.2d 670, 672 (Ct. App. 1991)(citing Rutledge v. St. Paul Fire and Marine Insurance Co., 286 S.C. 360, 334 S.E.2d 131 (Ct. App. 1985)). “Questions going to an expert’s knowledge of state of mind of the accused at the time of the crime are proper, and the expert’s opinion as to state of mind is admissible.” Id. (citing State v. Atkins, 303 S.C. 214, 399 S.E.2d 760 (1990), cert. denied, 501 U.S. 1259 (1991)).

The trial judge’s error harmed Appellant by preventing her from presenting a complete defense to the charges alleged and by denying her right to a fair trial. In light of the fact that the burden of proof was upon Appellant to present evidence to prove by a preponderance that she acted under duress, it was imperative that Appellant be afforded the opportunity to present expert testimony concerning her state of mind. Although trial counsel did not proffer testimony from Dr. Waid concerning Appellant’s state of mind, such a

proffer was unnecessary based upon the evidence in the record. See State v. Myers, 301 S.C. 251, 257-258, 391 S.E.2d 551, 555 (1990).²

² Additionally, a proffer was likely impossible in light of the trial judge's pre-trial ruling denying Appellant a continuance in order for Dr. Waid to evaluate her, which was based upon the judge's pre-trial ruling that Appellant could not present expert testimony on her state of mind. The trial judge effectively denied Appellant the opportunity to obtain necessary evidence for her defense and the ability to proffer the evidence in order to preserve the record.

III. The trial judge erred when she held that Appellant's expert could not respond to a hypothetical question.

Prior to Appellant calling her expert to testify, the state objected to Appellant questioning the expert concerning a document prepared by Appellant. R. 668 line 22 – R. 669 line 1. The document explained the evidence, which would be presented by Appellant during her testimony. R. 669 lines 16-23. Appellant intended to ask her expert a hypothetical question based upon the evidence as Appellant would provide in her testimony. R. 669 line 23. The trial judge held: “He can’t answer [a] hypothetical about what she could have done, would have done or is capable of doing. He can only testify in general as to human behavior, and the effects of fear on the human being generally situated.” R. 669 line 24 – R. 669 line 3. When Appellant explained he intended to present a hypothetical to the expert, the judge ruled “you can’t do a hypothetical if it’s going to have him say what she could have done or what she would do. That’s a jury question.” R. 671 lines 20-24.

The starting point for analyzing this issue is the South Carolina Rules of Evidence, which govern the admissibility of expert testimony. Specific to the issue presented, Rule 704 provides that “[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.” Rule 704, SCRE.

Numerous cases in South Carolina have addressed the admissibility of expert testimony. “It is well settled that ‘opinion testimony of an expert may be based upon a hypothetical question.’” Atkinson v. Orkin Exterminating Co., Inc., 361 S.C. 156, 170, 604 S.E.2d 385, 392 (2004)(quoting Gazes v. Dillard’s Dep’t Store, Inc., 341 S.C. 507, 514, 534 S.E.2d 306, 310 (Ct. App. 2000)); see also, State v. Evans, 316 S.C. 303, 310-311, 450

S.E.2d 47, 52 (1994)(permitting the prosecutor to present expert testimony on the level of the defendant's impairment based upon a hypothetical question regarding the effects of certain quantities of specific drugs and alcohol on an average-sized individual); State v. Burton, 302 S.C. 494, 499, 397 S.E.2d 90, 92-93 (1990)(holding that an expert may give an opinion based upon personal observations or in answer to a properly framed hypothetical). However, the hypothetical question must be based upon the facts as supported by the evidence. Id.; see also Burton, 302 S.C. at 499, 397 S.E. at 92. This Court held that "an expert can offer opinions based upon hypothetical questions embracing facts supported by the evidence." Duncan v. Ford Motor Company, 385 S.C. 119, 132, 682 S.E.2d 877, 883 (Ct. App. 2009). In fact, the hypothetical need not include all of the details in a particular case. Id., at 133, 682 S.E.2d at 883-884 (citing Brown v. La France Indus., 286 S.C. 319, 327, 333 S.E.2d 348, 353 (Ct. App. 1985)). A hypothetical question is proper as long as it contains "substantially all of the material facts necessary to the formation of an intelligent opinion." Id., at 133, 682 S.E.2d at 884; see also State v. McConnell, 316 S.C. 272, 277, 449 S.E.2d 778, 781 (Ct. App. 1994). Additionally, there is no error in permitting an expert to give his opinion in response to a hypothetical question if the material facts assumed are within the range of the evidence, even if not specifically proven. Evans, 316 S.C. at 311, 450 S.E.2d at 52. Recently, in State v. Morris, 376 S.C. 189, 205, 656 S.E.2d 359, 367-368 (2008), the Supreme Court of South Carolina affirmed the trial court's ruling permitting a party to present an expert a series of hypothetical situations and ask whether certain actions presented in those hypothetical questions would be illegal.

The trial court erred in refusing to permit Appellant to pose hypothetical questions her expert as such is allowed by Rule and clearly established court precedent. This error

harmed Appellant as it prevented the introduction of admissible evidence directly addressing Appellant's defense of duress. Although Appellant did not proffer the testimony of Dr. Waid in response to hypothetical questions, such was unnecessary to preserve the record in light of the evidence presented. See Myers, supra.

The trial judge's erroneous ruling harmed Appellant because she was prohibited from presenting a complete defense to the serious allegations presented by the prosecutor and denied her right to a fair trial. Inquiring of the expert witness by way of hypothetical questions would have enabled Appellant to prove by a preponderance of the evidence that she acted under duress.

CONCLUSION

Appellant respectfully requests this Court to reverse her convictions and sentences based upon the foregoing arguments and remand her case to the lower court for a new trial on the charged offenses.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 11th day of December, 2012.

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 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."

December 11th, 2012

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THE STATE,

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SASHA A. GASKINS,

APPELLANT

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 J. Benjamin Aplin, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 11th day of December, 2012.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 11th day of December, 2012.

Emily K. (L.S.)
Notary Public for South Carolina

My Commission Expires: November 16, 2022.

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