ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Paul M. Burch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CONNIE DUMAS,

APPELLANT

Appellate Case No. 2011-193106

FINAL BRIEF OF APPELLANT

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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I. Did the trial judge err in finding Appellant's statements to police were admissible where the interrogating officer misinformed Appellant of her Miranda rights by stating she would receive an attorney at a later date if she could not afford one?

II. Did the trial judge err in refusing to charge the jury as to the lesser-included offense of common law robbery where the defense presented evidence that Appellant did not present a weapon to the store clerk?

STATEMENT OF THE CASE

A York County Grand Jury indicted Appellant on armed robbery pursuant to indictment 2010-GS-46-3853 and possession of a firearm during the commission of a violent crime pursuant to indictment 2010-GS-46-3854. R. 259. E.B. Springs prosecuted Appellant on behalf of the state, and Michael Atwater represented Appellant. R. 1. The trial proceeded before the Honorable Paul M. Burch during the week of May 16, 2011. R. 1. The jury returned its verdict finding Appellant guilty of both counts. R. 238 lines 15-22. Judge Burch sentenced Appellant to eighteen years on the armed robbery conviction and five years concurrent on the possession of a firearm conviction. R. 256 lines 2-4.

Appellant filed a timely notice of appeal. This brief follows.

ARGUMENT

I. The trial judge erred in finding Appellant's statements to police were admissible where the interrogating officer misinformed Appellant of her Miranda rights by stating she would receive an attorney at a later date if she could not afford one.

Prior to the commencement of the trial, the prosecutor moved for a finding that statements made by Appellant were admissible as voluntarily made. The prosecutor called Detective Jerry Waldrop as his first witness. Detective Waldrop testified that he placed Appellant, who was handcuffed, in a police car after stopping her on the side of the road. R. 7 lines 15-19. He then advised Appellant of her rights as follows:

> Before I ask you anything, you've got the right to remain silent. Anything you say can and may be used against you in a court of law. You have the right to have an attorney present for your questioning. If you cannot afford to hire one - - if you cannot afford one, one will be appointed to you by the courts at a later date. You can stop answering questions at any time you so desire.

R. 8 lines 12-18. This was captured on the in-car video camera. R. 8 lines 2-14. Detective Waldrop then began questioning Appellant. R. 8 lines 23-24. Appellant provided an inculpatory statement thereafter. R. 11 lines 5-19.

Later, Appellant was taken to the police station. R. 11 lines 21-23. Waldrop then advised Appellant of her Miranda rights in writing as follows:

> Before we ask you any questions you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to an attorney for advice before we ask you any questions and have them with you during questioning. You have this right to advice and presence of an attorney even if you cannot afford to hire one. We have no way of appointing you an attorney, but one will be appointed by the court for you, if you wish. If you wish, you may answer the questions without the presence of an attorney and you may stop answering any time you desire until an attorney is present.

R. 13 lines 5-16. Subsequently, Appellant provided Waldrop with an inculpatory statement. R. 15 line 24 – R. 16 line 17.

Appellant testified during the pre-trial hearing as well. She testified that based on what Waldrop told her, "it was [her] understanding that [she] had no representation and no choice but to be asked questions without an attorney." R. 34 lines 2-6.

Appellant argued her statements were not admissible because Waldrop advised that "at some later date that she would be able to get an attorney." R. 45 lines 4-8. Appellant argued this misinformation made her reasonably believe that she did not have the right to have an attorney present during the questioning on the side of the street or during the interrogation at the police station. R. 45 lines 8-12. Appellant argued she was not properly advised of her rights and that any statement given by her was not admissible. R. 45 lines 19-23. Appellant admitted that the Supreme Court required "no exact verbiage" for advising a suspect of her rights, but noted that the Court did not give law enforcement "artistic license to change the meaning of Miranda." R. 47 lines 3-14.

The trial judge held that "the basics of the Miranda warning was given both times." R. 47 lines 19-20. Per the trial judge, "the business about a later date, that's just simply explaining the way the system works." R. 47 line 25 – R. 48 line 2.

During the trial, Waldrop testified on behalf of the prosecution. He testified that after placing Appellant in the back of a patrol car, he questioned her. Waldrop again testified that he advised Appellant that if she could not afford an attorney one would be appointed for her by the courts at a later date. R. 109 lines 20-22; R. 128 lines 22-25. Waldrop further testified that he interrogated Appellant and ultimately obtained inculpatory statements from her while she sat in the back of the patrol car. R. 113 line 18 – R. 114 line

9. Later, Appellant was transported to the police station. R. 116 line 24 – R. 117 line 4. Waldrop then advised Appellant of her rights using different language than he did during the roadside interrogation. R. 119 lines 10-23. According to Waldrop, Appellant then provided another inculpatory statement. R. 121 line 15 – R. 122 line 8.

In 1966, the United States Supreme Court issued its landmark decision Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966). As explained by the Court in Duckworth v. Eagan, 492 U.S. 195, 201, 109 S.Ct. 2875, 2879 (1989), Miranda established "certain procedural safeguards that require police to advise criminal suspects of their rights under the Fifth and Fourteenth Amendments before commencing custodial interrogation." In Miranda, the Court delineated four specific warnings: "(1) the right to remain silent; (2) that anything he says can be used against him in a court of law; (3) that he has the right to the presence of an attorney, and (4) that if he cannot afford an attorney one will be appointed for him prior to any questioning if he wants." Miranda, 384 U.S. at 479, 86 S.Ct. at 1630. Concerned that the circumstances surrounding a custodial interrogation can quickly overbear one's will, the Court held advising an individual of his right to consult with a lawyer and to have the lawyer present during interrogation was "an absolute prerequisite to interrogation." Id. at 471, 86 S.Ct. at 1626.

In California v. Prysock, 453 U.S. 355, 361, 101 S.Ct. 2806, 2810 (1981), the Court held an officer's warnings were sufficient where the officer informed the defendant of his right to the presence of appointed counsel prior to and during interrogation, but did not use the rigid language set out in Miranda. In examining the issue, the Court noted this was not a case in which the offer of an appointed attorney was associated with a future time in court. Id.

In Duckworth, the Court determined the following advisement of rights satisfied the requirements of Miranda:

> Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have a right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court. If you wish to answer question now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you've talked to a lawyer.

Id. at 198, 109 S.Ct. at 2877-2878 (emphasis in original). According to the Court, the relevant state law provided that an attorney would be appointed at the defendant's initial appearance; therefore, the advice regarding when an attorney would be appointed anticipated a question that a defendant would ask after being advised that he had the right to an attorney. Id. at 204, 109 S.Ct. at 2880-2881. In arriving at its conclusion, the Court focused on the totality of the warnings, including the advisement that the defendant could speak with an attorney prior to questioning, have an attorney present during questioning, and could stop answering questions until he spoke to an attorney. Additionally, the Duckworth Court explained the concerns expressed in Prysock were that warnings linking the appointment of counsel to a future point in time after the police interrogation were not present in Duckworth as the warnings specifically provided for counsel prior to and during any questioning and that the suspect could stop answering questions at any time until he spoke to an attorney. Id. at 205, 109 S.Ct. at 2881.

Recently, in Florida v. Powell, 130 S.Ct. 1195 (2010), the Supreme Court examined the requirement of Miranda that an individual be informed of his right to consult with an

attorney. In Powell, the arresting officer informed Powell that he had the right to talk to a lawyer before answering any of law enforcement's questions and that if he could not afford to hire a lawyer, one would be appointed for him without cost and before any questioning. Id. at 1200. Additionally, the officer advised Powell that he had the right to use any of his rights at any time during the interview. Id. The Court concluded that these warnings were sufficient because "[t]he first statement communicated that Powell could consult with a lawyer before answering any particular question, and the second statement confirmed that he could exercise that right while the interrogation was underway." Id. at 1205. Thus, the Court determined when read together, "the two warnings reasonably conveyed Powell's right to have an attorney present not only at the outset of the interrogation, but at all times." Id.

"[T]he right to have counsel present at [an] interrogation is indispensable to the protection of the Fifth Amendment privilege." Miranda, 384 at 469, 86 S.Ct. at 1625. This right to counsel includes "not merely a right to consult with counsel prior to questioning, but to have counsel present during any questioning." Id. at 470, 86 S.Ct. at 1625-1626. Taken as a whole, the advisement of rights provided by Waldrop on the roadside were inadequate. Although Waldrop advised Appellant that she had the right to have an attorney present for questioning, his next statement completely negated the advisement. Unlike the warnings in Duckworth, Waldrop did not advise Appellant that she had the right to an attorney prior to questioning or that she had the right to stop answering questions at any time until she had spoken to an attorney. What the Court warned against in Prysock is a reality in Appellant's case. Law enforcement connected the appointment of counsel for Appellant with a future unknown time without clearly conveying Appellant's rights to her prior to interrogation.

II. The trial judge erred in failing to charge the jury on the lesser-included offense of common law robbery where the defense presented evidence that Appellant did not present a weapon to the store clerk.

The state presented evidence that Appellant used a gun to rob the store. The prosecutor's first witness, the initial responding officer, testified that he observed a gun in the video captured by the store's surveillance cameras. R. 54 line 18 – R. 55 line 15. The store clerk also testified that she was robbed at gun point. R. 72 lines 11-17; R. 73 line 14 – R. 74 line 2; R. 80 lines 11-19. The prosecutor presented a customer in the parking lot, who testified he saw Appellant walk out of the store with a gun. R. 98 lines 24-25. Through Waldrop, the prosecution presented evidence that Appellant admitted to having a gun. R. 113 line 18 – R. 114 line 13; R. 121 line 16 – R. 122 line 8.

Appellant testified in her defense. She stated that she went to the counter at the store and asked for change for a hundred dollar bill. R. 163 lines 12-15. She was informed she must make a purchase in order to receive change. R. 163 line 17. Appellant placed the bill on the counter and walked the aisles looking for a purchase. R. 163 line 19 – R. 164 line 8; R. 199 line 15-22. Appellant re-approached the counter with a bottled water to purchase. R. 171 lines 16-17; R. 200 lines 14-16. She also had her car keys and cell phone in her hands. R. 171 lines 20-22. Appellant then asked the clerk about the bill she had left on the counter. R. 172 lines 13-21; R. 200 lines 20-22. The clerk denied receiving any money from Appellant. R. 172 lines 22-23; R. 200 line 23 – R. 201 line 1. The clerk then removed the cash drawer from the register and placed it on the counter to show Appellant that she did not have the bill. R. 176 lines 17-19; R. 201 lines 18-22. Appellant then took the money that was in the cash drawer. R. 174 lines 11-

24; R. 204 line 25 – R. 202 line 6. When asked on direct examination if she had a gun at any time at all during the day of the incident, Appellant responded she "never had a gun or been in possession or had access to a weapon or gun." R. 193 lines 3-5. On cross-examination, the prosecutor pressed Appellant on the issue of the gun, and Appellant continued to deny having a gun while in the store. R. 194 line 15 – R. 195 line 9.

At the close of the case, Appellant asked for a jury instruction on the lesser-included offense of common law robbery. R. 221 line 25 – R. 222 line 2. Appellant argued that the prosecution's position was that Appellant had a gun, but the Appellant put up evidence that she did not have a gun. R. 222 lines 6 – 14. The trial judge denied the request. R. 222 line 15; R. 222 lines 21-22. Later the prosecutor attempted to get Appellant to agree that the evidence did not support the judge charging any lesser-included offenses, but Appellant refused to do so. R. 223 lines 2-5.

A jury charge to a lesser-included offense is required when the evidence warrants such an instruction. State v. Geiger, 370 S.C. 600, 606, 635 S.E.2d 669, 673 (Ct. App. 2006). South Carolina law mandates a jury instruction on a lesser-included offense when there is any evidence from which it could be inferred that the lesser, rather than the greater, offense was committed. State v. Watson, 349 S.C. 372, 375, 563 S.E.2d 336, 337 (2002); see also State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241, 241 (1996). In other words, the evidence must allow "a rational inference" that the defendant committed the lesser offense. Geiger, 370 S.C. at 607, 635 S.E.2d at 673. In determining whether such a rational inference exists the court must examine the totality of evidence. Id. As this Court explained in State v. Patterson, 337 S.C. 215, 233, 522 S.E.2d 845, 854 (Ct. App. 1999), "[i]n order to justify a charge of a lesser included offense, the evidence must

be capable of sustaining either the greater or the lesser offense, depending on the jury's view of the facts."

Strong arm robbery, or common law robbery, is a lesser-included offense of armed robbery. S.C. Code Ann. § 16-11-330 (defining armed robbery as the commission of robbery while armed with a deadly weapon); State v. Gourdine, 322 S.C. 396, 472 S.E.2d 241 (1996); State v. Tasco, 292 S.C. 270, 356 S.E.2d 117 (1987); State v. Keith, 283 S.C. 597, 325 S.E.2d 325 (1985). In light of the contradictory evidence presented by the state and Appellant regarding the presence of a weapon, the trial judge was required to charge the jury on the lesser-included offense of common law robbery.

CONCLUSION

Appellant respectfully requests this Court reverse her convictions for armed robbery and possession of a weapon during the commission of a violent crime and remand the matters for a new trial.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 9th day of October, 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."

October 9th, 2012

Susan B. Hackett

Susan B. Hackett
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589