

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County
Honorable Paul M. Burch, Circuit Court Judge
Appellate Case Tracking No. 2011-193106

The State,

Respondent,

vs.

Connie M. Dumas,

Appellant.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIESii

STATEMENT OF ISSUES ON APPEAL1

STATEMENT OF THE CASE.....2

ARGUMENT3

 I. The trial court did not err in admitting Appellant’s statements to
 police because she was appropriately advised of her Miranda
 rights.3

 II. The trial court did not err in refusing to charge the lesser included
 offense of common law robbery because there was no evidence
 supporting solely the lesser included offense.8

CONCLUSION.....12

TABLE OF AUTHORITIES

Cases

<u>California v. Prysock</u> , 453 U.S. 355, 101 S.Ct. 2806, 69 L.Ed.2d 696 (1981).....	4, 6, 7
<u>Dempsey v. State</u> , 363 S.C. 365, 371, 610 S.E.2d 812, 815 (2005)	8
<u>Duckworth v. Eagan</u> , 492 U.S. 195, 201, 109 S.Ct. 2875, 106 L.Ed.2d 166 (1989)..	4, 6, 7
<u>Florida v. Powell</u> 130, S.Ct. 1195, 1203 (2010)	4
<u>Jackson v. Denno</u> , 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964).....	4
<u>Miranda v. Arizona</u> , 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)	passim
<u>State v. Baccus</u> , 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006).....	3
<u>State v. Fields</u> , 356 S.C. 517, 522-523, 589 S.E.2d 792, 795 (Ct. App. 2003).....	8
<u>State v. Funchess</u> , 267 S.C. 427, 229 S.E.2d 331 (1976)	9
<u>State v. Geiger</u> , 370 S.C. 600, 608, 635 S.E.2d 669, 674 (Ct. App. 2006).....	9
<u>State v. Gourdine</u> , 322 S.C. 396, 398, 472 S.E.2d 241, 242 (1996)	8
<u>State v. Kennedy</u> , 333 S.C. 426, 429, 510 S.E.2d 714, 715 (1998).....	3
<u>State v. Mitchell</u> , 382 S.C. 1, 4-5, 675 S.E.2d 435, 437 (2009)	9
<u>State v. Richardson</u> , 253 S.C. 468, 471-472, 171 S.E.2d 717, 719 (1969).....	6
<u>State v. Saltz</u> , 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001)	3
<u>State v. White</u> , 361 S.C. 407, 412, 605 S.E.2d 540, 542 (2004)	8
<u>State v. Wilson</u> , 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001).....	3

Other Authorities

S.C. Code Ann. § 16-11-330 (2003).....	9
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STATEMENT OF ISSUES ON APPEAL

- I. The trial court did not err in admitting Appellant's statements to police because she was appropriately advised of her Miranda rights.
- II. The trial court did not err in refusing to charge the lesser included offense of common law robbery because there was no evidence supporting solely the lesser included offense.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

ARGUMENT

I. The trial court did not err in admitting Appellant's statements to police because she was appropriately advised of her Miranda rights.

Appellant contends the trial court erred in admitting her statements to police. She claims the warnings given to her did not satisfy the requirements of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The warnings given by Detective Waldrop adequately covered all the procedural safeguards required by Miranda. Further, the fact Detective Waldrop's warning indicated an attorney would be appointed by the court at a later date did not render the warning inadequate.

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). This Court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The trial court's 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. State v. Kennedy, 333 S.C. 426, 429, 510 S.E.2d 714, 715 (1998). When reviewing a trial court's ruling concerning voluntariness, the appellate 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. State v. Saltz, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001).

To give force to the Constitution's protection against compelled self-incrimination, the United States Supreme Court (USSC) established in Miranda "certain procedural safeguards that require police to advise criminal suspects of their rights under

the Fifth and Fourteenth Amendments before commencing custodial interrogation.”

Duckworth v. Eagan, 492 U.S. 195, 201, 109 S.Ct. 2875, 106 L.Ed.2d 166 (1989).

Miranda prescribed the following four now-familiar warnings: “[A suspect] must be warned prior to any questioning [1] that he has 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 so desires.”

Florida v. Powell 130, S.Ct. 1195, 1203 (2010).

In California v. Prysock, 453 U.S. 355, 101 S.Ct. 2806, 69 L.Ed.2d 696 (1981) the USSC stated that “the ‘rigidity’ of Miranda [does not] exten[d] to the precise formulation of the warnings given a criminal defendant,” and “no talismanic incantation [is] required to satisfy its strictures.” Id., at 359, 101 S.Ct., at 2809. “Reviewing courts therefore need not examine Miranda warnings as if construing a will or defining the terms of an easement.” Duckworth, 492 U.S. at 203, 109 S.Ct. at 2880. The inquiry, instead, is whether the warnings reasonably “conve[y] to [a suspect] his rights as required by Miranda.” Prysock, 453 U.S., at 361, 101 S.Ct., at 2810.

The State asked for a hearing pursuant to Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). Detective Waldrop testified he orally provided a Miranda warning to Appellant when she was first placed in the police car after being detained in which he stated:

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.

(T.39; R. 8). Detective Waldrop provided written Miranda warnings at the police station.

The warnings read:

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 the 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.

(T.44; State's Exhibit 9; R. 13; 257). Further, the written form provided: "I have read or had read to me the statement of my rights shown above. I understand what my rights are and I'm willing to make a statement. I do not want an attorney at this time." (T.45; State's Exhibit 9; R. 14; 257). Appellant signed the form acknowledging her understanding.

Appellant objected to the admission of the statements given subsequent to the two warnings, on the grounds that the language used indicated the appointment of an attorney would occur at a later time, and Appellant reasonably did not believe she could have an attorney during questioning. The court found the requirements of Miranda were met because she was informed of all of her rights including the right to have counsel appointed. Specifically, he stated:

But the basics of the Miranda warning was given both times And then the business about a later date, that's just simply explaining the way the system works. There's no way that the police can provide an attorney right there on [the] side of the road or immediately at the beginning of an investigation. The rest of it's very clear as to what her rights were. She didn't have to answer any questions. She

could stop answering questions at any time. So the basic requirement of the trial was met here.

(T.79-80; R. 47-48). Subsequently at trial, Detective Waldrop testified similarly in front of the jury regarding the Miranda warnings and statements given by Appellant both in the police car as well as at the station. (T.264-269; 274-280; R. 109-114; 116-122).

In Duckworth, the USSC considered Miranda warnings very similar to those in the instant case. The warnings given provided:

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 questions 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.

Duckworth, 492 U.S. at 198, 109 S.Ct. at 2877-2878. The USSC found the above warnings adequately covered the four requirements of Miranda. The Court specifically addressed the "if and when you go to court" portion of the warning and found it merely explained the procedure used and that the defendant was properly advised of his right to counsel and to have counsel present for questioning. Id. at 203-204, 109 S.Ct. at 2880-2881; see also State v. Richardson, 253 S.C. 468, 471-472, 171 S.E.2d 717, 719 (1969) (finding a Miranda warning which provided "if he could not afford to hire an attorney that one would be appointed for him by the court free of charge before any questioning of him" was sufficient).

Further, in the Prysock case the USSC warned against any offer of an appointed attorney at a time after questioning. The Court found as long as the defendant was aware of his or her right to an attorney before and during questioning the precise language used was not important. Prysock, 453 U.S. at 360-361, 101 S.Ct. at 2810.

The warnings given in the current case adequately informed Appellant of her right to counsel before and during any questioning. Both warnings indicated she had the right to an attorney before she was asked any questions. Further, both warnings given indicated she had the right to an attorney present during the questioning and that she could stop answering questions at any time she desired. While the written Miranda warning is clearly more specific, both warnings adequately covered the prophylactic requirements of Miranda.

Additionally, as in Duckworth, the language used in this case merely explained the procedure used in appointing an attorney and did not indicate one would only be available at a later time after questioning as was warned against in Prysock. As a result, the trial court properly concluded the requirements of Miranda were met, and the other language did not render the warnings inadequate. Therefore, the admission of the statements should be affirmed.

II. The trial court did not err in refusing to charge the lesser included offense of common law robbery because there was no evidence supporting solely the lesser included offense.

Appellant maintains the trial court erred in failing to charge the jury on the lesser included offense of common law robbery because she testified she did not have a gun in her possession in the convenience store. Appellant's theory, however, was that she was solely taking back her money. As a result, there is no evidence from which Appellant could be convicted only of the lesser included offense rather than the greater offense of armed robbery. As a result, the trial court properly denied the request to charge the lesser included offense.

The law to be charged is determined by the evidence presented at trial. State v. White, 361 S.C. 407, 412, 605 S.E.2d 540, 542 (2004). "A trial judge is required to charge a jury on a lesser-included offense if there is evidence from which it could be inferred a defendant committed a lesser rather than a greater offense. Conversely, a trial judge does not err by refusing to charge a lesser-included offense where there is no evidence tending to show that the defendant was guilty only of the lesser offense." State v. Fields, 356 S.C. 517, 522-523, 589 S.E.2d 792, 795 (Ct. App. 2003) (internal citations omitted). "[A] judge is required to charge a jury on a lesser-included offense 'if there is any evidence from which it could be inferred the lesser, rather than the greater, offense was committed.'" Dempsey v. State, 363 S.C. 365, 371, 610 S.E.2d 812, 815 (2005) (quoting State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241, 242 (1996) (emphasis supplied)).

Additionally, "[t]he mere contention that the jury might accept the State's evidence in part and reject it in part is insufficient to satisfy the requirement that some

evidence tend to show the defendant was guilty only of the lesser offense.” State v. Geiger, 370 S.C. 600, 608, 635 S.E.2d 669, 674 (Ct. App. 2006) (citing State v. Funchess, 267 S.C. 427, 229 S.E.2d 331 (1976)).

Armed robbery occurs when a person commits robbery while either armed with a deadly weapon or alleging to be armed by the representation of a deadly weapon. S.C. Code Ann. § 16-11-330 (2003). “Included in armed robbery is the lesser included offense of robbery, which is defined as ‘the felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear.’” State v. Mitchell, 382 S.C. 1, 4-5, 675 S.E.2d 435, 437 (2009).

The State presented the testimony of the convenience store clerk, as well as several officers and a witness. The clerk indicated she was behind the register when Appellant approached and pointed a gun at her body. Appellant demanded money, and the clerk removed the drawer of the cash register and placed it on the counter as she had been trained in the event of a robbery. (T.141-142; 178-181; 200-201; R. 62-63; 72-75; 90-91). Appellant then asked where the rest of the money was and the clerk gave her an envelope containing money intended to be placed in the store safe. (T. 178-181; 186-187; R. 72-75; 80-81). Appellant then fled out the door past the witness waiting in the car with his children. The robbery was captured on the store’s video camera surveillance system. (T.143-147; 195-201; R. 64-68; 85-91).

The witness in the parking lot indicated he went into the store and made a purchase and that Appellant was very interested in his money. He testified he went outside and waited in the car with the children for their mother to arrive. While waiting,

he testified he watched Appellant exit the store with a lot of cash and a pistol. (T. 234-236; R. 96-97).

Appellant on the other hand insisted she was not committing a robbery but was merely getting her money back. She testified she placed a one hundred dollar bill on the counter and asked for change. Appellant was told she had to make a purchase and so she left the money on the counter and went and got some items to purchase. She testified when she returned her money was gone and the clerk claimed to know nothing about it. She testified the clerk removed the cash register drawer in order to prove to her that her money was not in there. Appellant testified she reached in the drawer and took money out because she was not leaving without her money. (T.456-468; R. 163-174).

Appellant was asked:

Q. When you were taking the money from the cashier at the One Stop, whose money did you believe you were taking?

A. Mine.

Q. Did you ever tell her that you intended to rob that place?

A. No.

Q. Did you ever lay a gun on the counter?

A. No

(T.481; R. 187). Appellant's theory was that she was taking her own money in change.¹

She presented no evidence from which it could be believed she committed common law robbery instead of armed robbery. There was absolutely no evidence suggesting Appellant committed a robbery—taking of the money by violence or by putting the clerk in fear. The evidence produced at trial indicates either 1) Appellant took the money by holding the clerk at gun point, which is armed robbery; or 2) she merely retrieved her

¹ It should be noted Appellant received a jury charge on the defense that a defendant cannot be guilty of robbery in taking his or her own money. She also received a mistake of fact charge based on her theory of the case. (T.609; R. 232).

own money she was due as change, and did so without placing the clerk in any fear and without the use of violence, which would result in her acquittal and would not support a charge of common law robbery.

The trial court was correct that when the evidence is considered, Appellant was either guilty of armed robbery, or not guilty and should be acquitted. There is no evidence presented from which she could be guilty only of the lesser included offense of common law robbery. Accordingly, the decision not to charge the lesser included offense should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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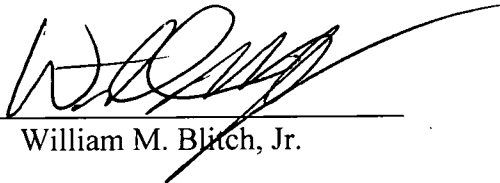
CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent 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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