STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JERRY SCANTLING,

APPELLANT

APPELLATE CASE NO. 2013-000488

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On June 24, 2010, a Beaufort County grand jury indicted appellant Jerry Scantling for possession of a stolen vehicle. R. 721. On July 11, 2011, a Beaufort County grand jury indicted appellant for murder, armed robbery, and a related weapons charge. R. 719. On February 25, 2013, appellant was tried before the Honorable Carmen T. Mullen and a jury. R. 1. Sean P. Thornton represented the State. R. 1. Matthew Walker and Lauren Carroway represented appellant. R. 1. The jury convicted appellant on all charges. R. 701, l. 16 – 702, l. 2. Pursuant to South Carolina's recidivist statute, Judge Mullen sentenced appellant to life without parole on the murder and armed robbery convictions. R. 708, l. 14 – 714, l. 17. Judge Mullen sentenced appellant to concurrent terms of five years' imprisonment on both the weapons charge and the possession of a stolen vehicle charge. R. 708, l. 14 – 714, l. 17. After timely filing and service of the notice of appeal, this appeal follows.

STATEMENT OF FACTS

The State accused appellant Jerry Scantling ("Scantling") of murdering Leonard Green ("Green") and stealing his truck. The only direct evidence against Scantling came from the mouths of a mother-daughter pair of jailhouse informants. Scantling's ex-girlfriend Brittney Raines ("Raines") was incarcerated at the Beaufort County Detention Center at the same time as Scantling. R. 534, ll. 4 – 9. She claimed that a vent led from the men's side of the jail to the women's side of the jail and that Scantling confessed to murdering Green through this vent. R. 534, ll. 10 – 20. R. 535, ll. 1 – 24. Raines' mother, Cynthia Padgett ("Padgett"), said that Scantling admitted to "an altercation" with Green and to stealing Green's truck to her through the same vent. R. 547, ll. 3 – 14. R. 548, l. 19 – 550, l. 12. Both Padgett and Raines had long criminal records and pending charges for forgery. R. 536, l. 12 – 537, l. 18. R. 540, l. 13 - 543, l. 16. R. 551, l. 10 – 552, l. 22. R. 555, l. 8 – 558, l. 6.

Padgett also supposedly told the police that Donald "Dirty Red" Cooper ("Dirty Red") was responsible for Scantling meeting Green. R. 554, ll. 16 – 21. Dirty Red worked with Green at Pizza Hut. R. 403, l. 5 – 404, l. 1. When police recovered Green's cell phone, they discovered outgoing calls on the night of the murder to Dirty Red's girlfriend. R. 405, l. 18 – 406, l. 16. Dirty Red claimed that even though the phone belonged to his girlfriend, he had "possession of the phone." R. 407, l. 9 – 408, l. 4. The State's DNA expert testified that a DNA profile from the gun recovered at the crime scene contained Green's DNA and the DNA of an unknown person. R. 468, l. 18 – 469, l. 2. Scantling was excluded as being the unknown person. R. 468, l. 25 – 469, l. 2. The State's expert did not testify whether they ever tested or obtained a DNA profile from Dirty Red. Dirty Red did not testify.

The remaining case against Scantling was circumstantial. Green's body was discovered on Sunday morning, May 23, 2010, after a maintenance worker noticed a shirt and a gun in the parking lot of the Pinckney Island boat landing in Hilton Head. R. 81, l. 11 – 83, l. 18. After the police arrived, they found Green's body in the bushes. R. 115, l. 23 – 116, l. 12. Green's body had two gunshot wounds and several other blunt force injuries on his back and head. R. 596, ll. 15 – 18. The only physical evidence from the scene tied to Scantling was DNA from a pair of abandoned headphones. R. 499, l. 25 – 500, l. 7. The headphones were found in the middle of the gravel parking lot well away from Green's body. R. 179, ll. 10 – 15. State's Ex. 31. State's Ex. 32. State's Ex. 3. This boat landing was known to have criminal activity including drug use, car break-ins, and thefts. R. 108, ll. 22 – 24.

The police were not able to definitively match the bullet recovered from Green's body at the autopsy to the firearm found in the boat landing. R. 489, ll. 10 – 14. The police found an unknown person's DNA on Green's cell phone, but Scantling was excluded from that profile. R. 494, ll. 12 – 14. An unidentified person's DNA was found inside Green's truck. R. 498, ll. 11 – 22. Scantling was excluded as a contributor to the DNA profiles found in multiple places inside Green's truck. R. 497, l. 20 – 499, l. 1.

Despite the lack of Scantling's DNA in Green's truck, four witnesses testified they saw Scantling inside a red truck matching Green's truck the night of the murder. R. 195, ll. 4 – 8. R. 202, l. 3 – 204, l. 8. R. 215, l. 1 – 217, l. 15. One of the witnesses, William Barnes, said that Scantling, who he claimed he had never seen before, came to his door in the middle of the night and tried to sell him the truck. R. 188, l. 15 – 189, l. 25. Another witness claimed she saw Scantling cleaning out a red pickup truck at the same apartment

complex in the wee morning hours. R. 228, l. 13 – 230, l. 8. The police searched the dumpster at the apartment complex and found several items they connected to Green. R. 261, l. 1 – 264, l. 24. The police later found Green's truck in Savannah, Georgia. R. 351, ll. 12 – 13.

Scantling was arrested three days after the murder when police pulled him over driving a stolen Monte Carlo. R. 379, l. 18 – 380, l. 17. The Monte Carlo was stolen from Savannah. R. 380, ll. 7 – 8. When the police interrogated Scantling, they lied and told him they had his DNA and video of him from the apartment complex. R. 411, l. 10 – 412, l. 10. Despite the police deception, Scantling denied he had anything to do with Green's murder. R. 451, l. 8 – 452, l. 18. Scantling said Green made a homosexual advance on him at a Wal-Mart the morning of the murder. R. 451, ll. 15 – 24. Scantling declined the advance. R. 451, ll. 15 – 24. Scantling later that night saw Green in another part of town and Green offered Scantling money if he would go to Ridgeland with him. R. 452, ll. 4 – 9. Scantling again told Green that he was not a homosexual and they both went their separate ways.[1] R. 452, ll. 4 – 18.

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[1] During closing argument, the defense suggested that trying to proposition random men for homosexual activity was dangerous behavior that could have led to an unknown assailant murdering Green. R. 660, l. 8 – 661, l. 20. William Barnes, the witness who claimed to see Scantling trying to sell Green's truck at the apartment complex, admitted on cross-examination that his boyfriend Jamar knew Scantling. R. 196, l. 25 – 197, l. 13. Barnes never said anything about going anywhere with Scantling in the truck that night. However, another witness from the apartment complex, Derik King, testified he saw Barnes and his boyfriend leave in the truck with Scantling. R. 224, l. 19 – 225, l. 2. Scantling was homeless and slept under the stairs of this apartment complex. R. 208, ll. 16 – 24. Barnes had a significant criminal record. R. 198, l. 7 – 199, l. 18.

ARGUMENT

1.

The trial court should have granted a mistrial after the solicitor commented on appellant's post-arrest silence during closing argument.

Relevant Facts

Lead investigator Robert Bromage ("Bromage") participated in the interrogation of Scantling. During the interrogation, Bromage presented Scantling with a still photograph taken by a surveillance camera at Wal-Mart in Savannah. R. 422, ll. 6 – 423, l. 19. Green's phone was located in the trash of the men's room of this Wal-Mart. R. 422, ll. 6 – 12. The picture was blurry. R. 422, ll. 20 – 23. When Scantling was presented the photograph during the interrogation, Bromage quoted Scantling as saying, "I ain't going to say it's me, I ain't going to say it ain't, **I don't want to incriminate myself.**" R. 423, ll. 5 – 8 (emphasis added). Bromage told the jury, "That's exactly what he said." R. 423, l. 8.

Scantling's attorney immediately objected. R. 423, ll. 10 – 11. Judge Mullen said, subject to your prior, yes, objection. Noted for the record. Thank you, sir." R. 423, ll. 12 – 13. Scantling's attorney added, "But I also want to avoid any comments on his exercising any of his rights –"R. 423, ll. 14 – 15. The trial judge stated, "All right. Just keep going. Let's get past that." R. 423, ll. 16 – 17.

Scantling's attorney again brought the impropriety of the last part of Scantling's statement, "I don't want to incriminate myself," to the trial judge's attention after the conclusion of Bromage's testimony. R. 458, l. 9 – 460, l. 2. Scantling's attorney stated that "any focus on that statement would be a comment on [Scantling's] exercise [of] his right against self-incrimination." R. 458, ll. 20 – 23. The trial judge responded, "Other than he's

the one that mentioned it." R. 458, ll. 24 – 25. After the State responded, Scantling's attorney restated his argument and said "the comment on it is improper." R. 459, l. 17 – 23.

During closing argument, the solicitor told the jury:

> Who else is seen at Wal-Mart? I ain't going to say it's me and I ain't going to say it's not. Is this picture fantastic? No, it's blurry. **Did Jerry Scantling tell Bob Bromage, no, man, I wasn't in Savannah; that's not me. No, he didn't.** What did he say? I ain't going to say it's me and ain't going to say it's not. What does he tell Captain Bromage?

R. 629, ll. 11 – 22 (emphasis added). After the solicitor finished his argument, Scantling's attorney told the trial court, "I've got a matter of law. We can do that maybe after my close, or do you want to do it now?" R. 635, ll. 15 – 17. The trial court stated, "Afterwards is fine." R. 635, l. 18.

After closing and before the jury was charged, Scantling moved for a mistrial. R. 665, l. 18 – 667, l. 9. Citing Doyle v. Ohio, 426 U.S. 610, 611 (1976), defense counsel argued the solicitor commented on Scantling's silence when he told the jury that Scantling did not tell Bromage he was not in Savannah. R. 665, ll. 21 – 25. Stating that she needed to "reread Doyle over the break," Judge Mullen deferred her ruling. R. 667, ll. 5 – 6. After sentencing, Scantling moved for a new trial on the Doyle issue. R. 716, ll. 17 – 20. Judge Mullen denied the motion "based on all my earlier rulings." R. 717, ll. 3 – 5.

Discussion

In Doyle v. Ohio, 426 U.S. 610, 611 (1976), the United States Supreme Court held it is improper for the prosecution to comment or elicit testimony concerning a defendant's exercise of his right to remain silent post-arrest. See also Griffin v. California, 380 U.S. 609 (1965); State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987). "The obvious purpose is to try to prevent jurors from improperly inferring the accused is guilty simply because he

exercised rights guaranteed to him by the state and federal constitutions." Edmond v. State, 341 S.C. 340, 346, 534 S.E.2d 682, 685 (2000).

In State v. Smith, 290 S.C. 393, 350 S.E.2d 923 (1986), our Supreme Court made clear "[a]n accused has the right to remain silent and the exercise of that right cannot be used against him. The [s]tate cannot, through evidence or the solicitor's argument, comment on the accused's exercise of his right to remain silent." Id. at 394-395, 350 S.E.2d at 924. "Testimony that a defendant refused to comment on an accusation against him is an unconstitutional comment on his post-arrest silence." Id. at 395, 350 S.E.2d at 924.

When the prosecutor comments upon or presents evidence of a defendant's post-arrest silence, our Courts review the error under a harmless error standard. Specifically, our Supreme Court has outlined multiple factors to consider when determining whether such an error was harmless. "To be harmless, the record must establish the reference to the defendant's right to silence was a single reference, which was not repeated or alluded to; the solicitor did not tie the defendant's silence directly to his exculpatory story; the exculpatory story was totally implausible; and the evidence of guilt was overwhelming." State v. Pickens, 320 S.C. 528, 530-531, 466 S.E.2d 364, 366 (1996); see also State v. McIntosh, 358 S.C. 432, 447, 595 S.E.2d 484, 492 (2004).

The solicitor's statement in closing was a comment on Scantling's post-arrest silence. Scantling was under no obligation to tell the police his whereabouts (or anything else). The solicitor's argument inferred that Scantling was guilty because he refused to deny that he was in Savannah at the time the blurry photograph at Wal-Mart was taken.

Nor can this error be harmless. The record contains two direct comments on Scantling's silence and a third indirect comment. The first direct comment was Bromage

repeating that Scantling said, "I don't want to incriminate myself." R. 423, ll. 5 – 8. The second direct comment was the above-discussed argument by the solicitor. R. 629, ll. 11 – 18. The third comment, which was more indirect, occurred when the solicitor, when asking Bromage a question, repeated Bromage's testimony allegedly quoting Scantling saying "I ain't saying it's me and I ain't saying it's not.". R. 425, ll. 5 – 8. Since the comment on Scantling's silence was repeated, the error cannot be harmless.

Furthermore, the evidence of Scantling's guilt was not overwhelming. The only direct evidence was the supposed confession through a vent from the male side of the jail to the female side and made to a mother-daughter pair of jailhouse informants facing pending charges. The remainder of the case was circumstantial and the DNA evidence gathered tended to disprove Scantling's involvement and show the involvement of an unknown third person. The only evidence tying Scantling to the crime scene was his DNA on a pair of abandoned headphones found at the boat landing's parking lot away from the body. Scantling denied his involvement to police. Scantling's encounters with Green show that Green was engaging in risky behavior that day that could have jeopardized his safety wholly unrelated to Scantling. Under the facts of this case, the comment on Scantling's silence cannot be harmless and this case should be reversed.

2.

The trial court erred in refusing to grant a mistrial after a prosecution witness referred to a burglary charge against appellant previously ruled inadmissible by the trial court.

Relevant Facts

At a recess, the attorneys told the court that they needed an in-camera hearing before Brittany Raines took the stand. R. 461, l. 4 – 462, l. 18. The State agreed that an in-camera hearing "would be smart." R. 461, ll. 10 – 11. The State told the trial judge that, in her statement to police, Raines mentioned a burglary charge against Scantling that had been severed from the trial of the instant charges. R. 461, ll. 14 – 23. R. 566, l. 1 – 568, l. 2. The solicitor said, "Now, I've already cautioned her once [about mentioning the burglary]. But I find it, in the past, has been helpful when they get to come in and I can tell them that as we're going through the process, as well." R. 461, ll. 14 – 23.

The court agreed and the State proffered Raines' testimony. At the end of Raines' proffer, Judge Mullen told her, "The only thing I need to also caution you on, Ms. Raines: **I don't want to hear the word burglary come out of your mouth.** Do you understand?" R. 522, ll. 3 – 6 (emphasis added). The trial judge further warned Raines, "You're not to discuss that in any way. Do you understand that?" R. 522, ll. 8 – 9. After the court finished cautioning Raines, the solicitor asked the trial judge for a break so he could "step to the back" and caution Raines' mother, Padgett, not to mention the burglary. R. 522, l. 21 – 523, l. 2. Judge Mullen told the solicitor to tell Padgett "Not to talk about any prior bad acts." R. 523, ll. 3 – 4. The trial recessed so the solicitor could warn Padgett. R. 523, ll. 9 – 20.

When the trial resumed, the solicitor told Judge Mullen, "She's been so-instructed, Your Honor." R. 523, ll. 21 – 22.

During Padgett's direct examination, Padgett testified about her alleged conversations with Scantling through the vent at the jail. R. 546, l. 25 – 550, l. 12. After Padgett recounted Scantling's alleged confession, the following exchange occurred:

> Q. And are those the statements that Jerry Scantling made to you about—
>
> A. That is correct.
>
> Q. –what his charges were?
>
> A. That is correct.
>
> Q. And what he did?
>
> A. That—he didn't make any statement to—he had told me that his charges, that he had been there on a burglary and but then he said—

R. 550, ll. 13 – 21. Scantling immediately objected. R. 550, l. 22. Judge Mullen told the jury, "Ladies and gentlemen, I'm going to strike that. It's not appropriate. You are not to consider it." R. 550, l. 24 – 551, l. 1. After defense counsel told the court he had a matter of law, Judge Mullen told him and the solicitor they were "going to finish with this—go." R. 551, ll. 2 – 5.

At the next break, Scantling moved for a mistrial. R. 566, l. 1 – 568, l. 3. He argued that a mistrial was required because of the "extraordinary precautions" taken to exclude any reference to the burglary charge from the trial and that the charge had been severed. R. 566, ll. 2 – 16. He noted that Padgett had been "specifically warned ahead of time." R. 566, ll. 8 – 12. He argued that a mistrial was required because "we can't unring that bell." R. 566, ll. 13 – 16.

The trial judge denied the motion, stating, "I really don't see any resulting prejudice." R. 567, ll. 14 – 16. Judge Mullen stated the lack of prejudice was because Scantling had already admitted to the jury that he stole the Monte Carlo that was the subject of the possession of a stolen vehicle charge being tried. R. 567, ll. 17 – 18. She stated that a mistrial "is a very extreme measure to be avoided at all possible" and denied the motion. R. 567, l. 19 – 568, l. 3. Scantling renewed the motion during his motion for a new trial and it was denied. R. 716, l. 1 – 717, l. 19.

Discussion

Since the burglary had already been severed, this means the trial court had already found that trying it with the instant charges would prevent the jury from making a reliable judgment about Scantling's guilt. State v. Spears, 393 S.C. 466, 475, 713 S.E.2d 324, 329 (Ct. App. 2011). "Prejudice to a defendant may occur where the defendant is jointly tried on charges resulting in the admission of prior bad act evidence that would have otherwise been inadmissible." State v. Beekman, 405 S.C. 225, 230, 746 S.E.2d 483, 486 (Ct. App. 2013). The trial judge's instructions not to mention the burglary, through the solicitor, are similar to a ruling *in limine*. "The purpose of a motion *in limine* is to prevent disclosure of potentially prejudicial matter to the jury." State v. Floyd, 295 S.C. 518, 520, 369 S.E.2d 842, 843 (1988).

Despite the warning from the prosecutor and his intent to keep his witnesses from mentioning the burglary, his question specifically asked the witness what she knew about Scantling's charges. R. 550, ll. 13 – 21. The solicitor took partial responsibility because he "asked a fairly inartful question." R. 566, ll. 18 – 22. Regardless of his intent, the defense argued that a mistrial was still required and the prejudice was evident because of the

"extensive preparations" the parties and the court made to keep this irrelevant matter from the jury. R. 566, l. 1 – 568, l. 3. R. 716, ll. 1 – 11. Even if unintentional, the effect of the solicitor's question is the same and the prejudice to Scantling is the same. See State v. Parker, 391 S.C. 606, 609, 707 S.E.2d 799, 800 (2011) (finding a mistrial was appropriate, in part, because of the State's misconduct in using evidence previously agreed to be inadmissible).

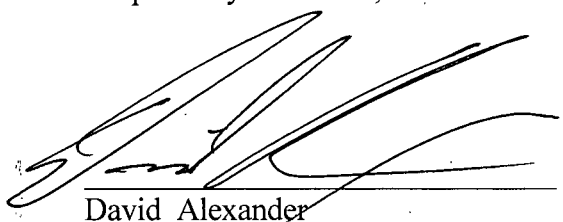
The trial judge's ruling that no prejudice occurred was contradicted by her earlier repeated and emphatic instructions to Raines not to mention the burglary. R. 522, ll. 3 – 9. Judge Mullen previously told Raines that she did not "want to hear the word burglary" come out of her mouth. R. 522, ll. 3 – 6. However, when Padgett mentioned the word "burglary," Judge Mullen found it not prejudicial. In this case with little circumstantial evidence tying Scantling to the crime and the suspect testimony of informants Raines and Padgett, this error cannot be harmless. It was evidence of another crime that could have caused the jury to convict Scantling because they thought he had a bad character instead of based on the evidence presented at trial. The State did not indict Scantling for murder until over a year after his arrest. The jury deliberated for over three hours. R. 691, ll. 1 – 2. R. 700, ll. 13 – 14. They also asked the court for the difference between murder and manslaughter. R. 694, ll. 12 – 15.

For these reasons, the Court should reverse and grant Scantling a new trial.

CONCLUSION

For the above-stated reasons, this Court should reverse Scantling's convictions and grant him a new trial.

Respectfully submitted,



David Alexander
Appellate Defender

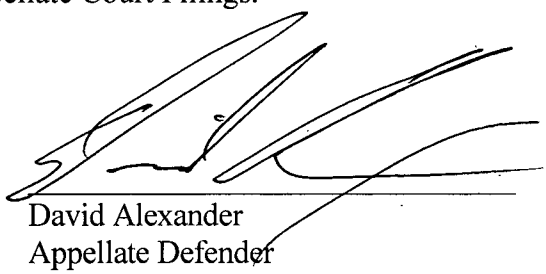
ATTORNEY FOR APPELLANT

This 18th day of December, 2014.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

December 18th, 2014



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