ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Anderson County

Honorable J. C. Buddy Nicholson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DARRELL EUGENE BLACKWELL,

APPELLANT

RECEIVED
AUG 12 2019
SC Court of Appeals

APPELLATE CASE NO. 2018-001892

INITIAL BRIEF OF APPELLANT

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admit, but that he would read whatever transcript the parties were relying on at the time of the Jackson v. Denno statement. Tr. 61, l. 10 – 62, l. 9.

Hill said the video recording of the robbery was not shown to appellant until the end of the interview. Tr. 63, ll. 19-24. Investigator Hill admitted that Detective Garrett telling appellant what allegedly happened in the store before showing him the videotape *was an "interrogation tactic."* Hill added, "Detective Garrett did that. I don't know what his motives were behind it." Tr. 64, ll. 3-5. (emphasis added). The following occurred on cross-examination of Investigator Hill:

> Q: Usually the idea is to get someone to agree with you that, in fact, it happened a certain – a certain way, correct?
>
> A: The motive is to find out what happened from the person we're speaking with.
>
> Q: Not to obtain a confession?
>
> A: If they're guilty, then, yes, confession.
>
> Q: So he was shown a video, and then without seeing it he was told what happened?
>
> A: Yes.

Tr. 64, ll. 6-15.

Defense counsel then argued that appellant's will was overborne during the statement and that it was not freely and voluntarily given. Defense counsel argued, "Mr. Blackwell is not a sophisticated man. He was led along through a confession being told that the video showed certain things and not actually being shown it. That's the basis of our argument, Judge. Nothing more, nothing less. And we think that that led to his will to be overborne and makes this confession not -- not freely and voluntarily given." Tr. 65, l. 21 – 70, l. 3. The judge denied the motion to suppress appellant's statement given during the interview. Tr. 70, ll. 4-22.

Defense counsel Lucus, the next day, added Confrontation Clause and hearsay objections to the admission of the Detective Garrett - Appellant interview audiotape when he learned Detective Garrett was not being brought back to Anderson from Washington State to testify, and be subject to cross-examination. Tr. 186, l. 2 – 197, l. 11.

Testimony before the jury

Anderson County Sherriff's Deputy Rhonda Phillips testified on the night of January 9, 2016, she was dispatched to the Shop Rite on Sayre Street. Tr. 79, l. 4 – 81, l. 11. The description of the robber was that he was a "white man with a beard that left in a [white] van." Phillips did not know if the robber was disguised, and she did not watch the surveillance tape of the robbery. Tr. 82, l. 3 – 83, l. 11.

During the investigation, the police went to a house owned by appellant's mother, which was located next to a dilapidated house – the police thought was "unoccupied" -- where appellant apparently lived. The white van the police believed was present during the robbery was parked behind one of the houses. The police found a brown stocking cap and "a black jacket with a gray hood" which they believed from the videotape appellant was wearing at the time of the robbery. Tr. 154, l. 23 – 168, l. 17.

When the state went to introduce the audiotape of appellant's interview with Detective Garrett, defense counsel objected. Tr. 182, l. 6 – 184, l. 14. Defense counsel Lucas said Investigator Hill admitted he did not ask any questions during the interview and that "all questions were asked by Detective Garrett." Tr. 185, ll. 10-20. Defense counsel argued that admitting the audiotape of appellant's interview without a chance to confront and cross-examine Detective Garrett violated appellant's right to confrontation. Counsel also noted that Detective

Garrett's statements during the interrogation were hearsay and it was clear some of them were offered for the truth of the matter asserted.

Defense counsel told the judge his argument was grounded in State v. Brewer, 411 S.C. 401, 768 S.E.2d 656 (2015), as to hearsay statements that were made during an interrogation not being admissible in evidence against the defendant. Tr. 186, l. 3 – 197 l. 12. The judge denied appellant's confrontation clause and hearsay objections as they pertained to the interview between Detective Garrett and appellant. Defense counsel said he was "caught by surprise" when Detective Garrett was not testifying "today," and that "this is a new issue for me as of yesterday." Tr. 188, l. 17 – 197, l. 22. The Garrett-Appellant interview was then played for the jury over appellant's objection. Tr. 197, ll. 20-22.

The taped interview between Garrett and Appellant

Investigator Hill claimed appellant acknowledged that he was the man on the videotape, although the audiotape itself seems to have appellant never admitting that fact and stating, "If I did it, I did it," and that he needed help if he did it. Again, the audiotape is on file with this Court. Tr. 198, l. 2 – 200, l. 7.

In the audiotaped statement between Detective Garrett and appellant, the following occurred in what can only be described as a very bizarre police interview with appellant. Again, the tape is on file with this Court.

Investigator Garrett, who did not testify at trial told appellant he was captured on videotape robbing the store. No one identified appellant in court as the robber on the videotape. Garrett told appellant during the interview the video was "very damning" although Garrett allegedly could not get the video to play until the end of the interview. (Hill testified this was an interrogation tactic). Garrett told appellant that it "was plain as day" that he had a gun in one

hand, and a knife in his left hand where he claimed he could not get the video to play. Again, no one, including Garrett, or the person behind the counter on the videotape at the time the robber entered, identified appellant at trial as the robber on the tape.

Appellant – his voice rising – denied having a knife with him, and he said he only had a toy gun, a cap gun. He said he never had owned a real gun, and he said he either bought or sold the toy gun on Craigslist. No gun was ever recovered.

Appellant said his van was running hot that night so he went to the store to see Sherry. Appellant said he knew Sherry would give him water for the van, and apparently money to fix it. Garrett noted that Sherry was supposed to be working that night, but she "mysteriously had to leave" before the robbery occurred. Later in the interview, Garrett asked appellant if Sherry "was in on" the robbery, thereby signaling he had reason to think the robbery was an "inside job," or he was using deception to further his confession cause.

Appellant never admitted he was the robber even when Garrett told appellant he went into the store to "rob it," and that it was allegedly "plain as day" he had a gun and a knife during the robbery. Garrett said he understood appellant's mother denied it was appellant on the videotape, but Garrett said it was understandable appellant's mother would say that. Appellant's mother also did not testify at trial.

Appellant admitted to taking $98.00, and cigarettes from the store but he denied taking a laptop or to stealing cigarette coupons. At one point, appellant seemed to maintain no one was in the store at the time he took these items. When Garrett finally played the videotape of the robbery, appellant still did not admit it was him on the videotape. Appellant only said after watching the videotape that he did not remember it, and he said if "I did it, I did it," and that he

needed help. Appellant asked Garrett for advice, and Garrett told appellant he had a good lawyer, and to talk to his attorney, and pray.

Discussion

In State v. Brewer, 411 S.C. 401, 768 S.E.2d 656 (2015), the Supreme Court acknowledged that law enforcement investigation techniques can include misrepresenting the existence and strength of evidence against an accused as well as asking the accused to produce evidence voluntarily. State v. Von Dohlen, 322 S.C. 234, 244, 471 S.E.2d 689, 695 (1996). The Court in Brewer noted that the investigators frequently referenced and quoted purported eyewitnesses to Brewer about shooting both victims. The Court held the evidence was hearsay, it was offered for the purpose of proving the truth of the matter asserted, and it ruled that they were inadmissible.

The Court wrote, "We emphasize that today's decision is not a categorical rule that any statement by an investigator during an interrogation is inadmissible at trial. As recognized by the North Carolina Court of Appeals, however, caution must be exercised in the admission of such evidence to ensure that all out-of-court statements are either 'admissible for a valid non-hearsay purpose or as an exception to the hearsay rule in order to safeguard against an end-run around the evidentiary and constitutional proscriptions against the admission of hearsay.' State v. Miller, 197 N.C. App. 78, 676 S.E.2d 546, 556 (2009). To that end, 'we would like to remind trial courts that the questions police pose during suspect interviews may contain false accusations, inherently unreliable, unconfirmed or false statements, and inflammatory remarks that constitute legitimate points of inquiry during a police interrogation, but would otherwise be inadmissible in open court.'" State v. Brewer, 411 S.C. 401, 407-08, 768 S.E.2d 656, 659 (2015).

As seen, Investigator Hill, the testifying witness for the state, testified in the absence of Detective Garrett that Garrett was using investigatory tactics by telling appellant what was on the videotape without showing appellant the videotape until the very end of the interview. Detective Garrett told appellant throughout the interview that he was the robber, that he was armed with a gun and a knife. and that he stole various items including a laptop and cigarette coupons, as well as cigarettes, from the store that night. Garrett insinuated he had reason to believe the robbery was an "inside job" between appellant and Sherry who was "mysteriously missing" that night.

The audiotape can be difficult to decipher at times, but Investigator Hill's interpretation of the audiotape, particularly as it pertains to Hill's bold statement that appellant admitted his guilt, shows the very difficulty that State v. Brewer warned against, because it denied appellant the opportunity to confront and cross-examine Detective Garrett, and it allowed Detective Garrett's hearsay statements about the robbery to be placed before the jury.

Appellant had the right under the Confrontation clause to confront and cross-examine Garrett about his interrogation tactics, and him telling appellant it was clear that appellant was armed with a knife in his left hand where that was not apparent, particularly in the seconds the jury had to watch the videotape in "real time."

A defendant demonstrates a Confrontation Clause violation when he is prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical for of bias . . . from which jurors . . . could draw inferences relating to the reliability of the witness." State v. Stokes, 381 S.C. 390, 401-01, 673 S.E.2d 434, 439 (2009), *citing* Delaware v. Van Arsdall, 475 U.S. 673, 680 (2012). State v. Gracely, 399 S.C. 363, 372, 731 S.E.2d 880, 885 (2012).

Appellant had the right to confront and cross-examine Garrett about his assertions that it was appellant that went into the store, that appellant planned to rob the store, that appellant was

armed with a knife in his left hand, about what appellant's mother actually said about the videotape, and his insinuations that Sherry may have "been in" on the crime, as they were, Garrett's hearsay assertions. See State v. Washington, 379 S.C. 120, 665 S.E.2d 602 (2008) *citing* State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001). Defense counsel made the proper objection that the admission of the audiotape without the opportunity to confront and cross-examine Garrett denied appellant his rights under the Confrontation Clause, and allowed the admission of hearsay assertions to go unchallenged. Appellant should be granted a new trial. State v. Brewer, 411 S.C. 401, 407-08, 768 S.E.2d 656, 659 (2015).

2.

The court erred by refusing to instruct the jury on the lesser-included offense of strong arm robbery, where there was no testimony appellant was armed with a deadly weapon, appellant denied using a knife, and the videotape was inconclusive on the knife, and where there was no evidence the clerk working at the store thought the toy gun was represented as being a real gun, since appellant was entitled to that lesser-included offense instruction under the "any evidence" standard

Relevant Facts

Defense counsel requested a charge on the lesser included offense of strong arm robbery. "And we're requesting it on the basis that we believe the defendant's statements, that he did not have a knife and it was a toy gun, would substantiate that charge." Tr. 247, ll. 17-23. The request to charge was marked as Court's Exhibit 3 and it is before this Court to review.

The solicitor argued that "[t]he only evidence in the record is that a knife was used based on the video and stills. Additionally, the defendant himself does admit to having a gun, albeit a toy gun. That still lends itself to armed robbery as opposed to strong arm [robbery]." Tr. 248, l. 19 – 249, l. 2.

The judge responded, "All right. As I stated earlier in our charge conference, I'm not going to charge that, so your motion to make it strong arm robbery is denied." Tr. 249, ll. 2-5. Thus, the record shows defense counsel requested the instruction on the lesser-included offense at the charge conference, which was denied, and he again took exception to the judge's refusal to give that instruction after the judge charged the jury.

Defense counsel argued that the clerk jumping back when the robber approached did not prove that appellant, if he was the robber, was armed with a deadly weapon. Counsel argued that

jumping back was a reasonable response when somebody was coming over the counter toward the clerk, and that the state did not bring in the clerk from the store to testify whether he thought appellant was armed with a deadly weapon – the toy gun being real or him having a knife. The state also did not bring back Detective Garrett from Washington State, even though "he's a plane ticket away," to testify about what occurred during the interview with appellant. Tr. 229, l. 1 – 232, l. 4.

Appellant told Detective Garrett "it was not a real gun. It was a cap gun. . . . There's no gun ever recovered from Mr. Blackwell's house or his mother's house." Defense counsel asked the jury to determine from the video "does he have a knife?" Again, defense counsel reminded the jury that no one present during the robbery was brought to court to testify. Tr. 232, l. 5 – 233, l. 11.

Discussion

South Carolina Code § 16-11-330(A) states that "A person who commits robbery *while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon, or while alleging either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon*, is guilty of a felony and, upon conviction, must be imprisoned for a mandatory minimum term of not less than ten years or more than thirty years, no part of which may be suspended or probation granted." (emphasis added).

This is a very unusual case where the state chose, for reasons that it will only understood, not to call Detective Garrett to testify as to appellant's statement, and it chose not to call the clerk who was working at the time of the robbery. Undersigned counsel has watched the videotape of the robbery many times -- something the jury did not have the opportunity to do --

and while it does show a gun, albeit a toy gun, there was no testimony that the clerk thought the toy gun was real. Further, the videotape was less clear as to the robber using a knife as a deadly weapon. If there was an object in the robber's left hand, which the state claimed was a knife, it would have had to have been inside a case or the robber would have badly cut his hand as he jumped about and over the counter during the robbery. Again, the clerk from the store did not testify.

Further, there were a lot of things happening on the videotape outside the matter of whether appellant was armed with a knife as a deadly weapon for the jury to observe.

Whether an object has been used as a deadly weapon depends upon the facts and circumstances of each case. State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992) (fist); State v. Bennett, 328 S.C. 251, 493 S.E.2d 845 (1997)(fists). A trial judge must charge the lesser-included offense, here, strong arm robbery, if there is any evidence from which it can be inferred that the defendant committed the lesser rather than the greater offense. See, State v. Simmons, 360 S.C. 33, 43-44, 599 S.E.2d 448, 453 (2004) *citing* Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999).

There was no evidence in this case that a person present during the commission of the robbery reasonably believed that appellant, if he was the robber, represented that he was armed with a deadly weapon during the robbery. See S.C. Code § 16-11-330(A). The videotape was inconclusive on the knife issue, and the only evidence outside of the videotape itself, was that the gun was a toy gun, "a cap gun."

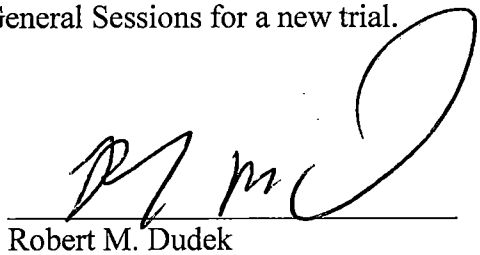
A jury question was presented in this unusual case whether appellant was armed with a deadly weapon where it was unclear the object in his left hand was a knife, a deadly weapon, and where the only evidence was that the gun used in the robbery was a toy gun. Cf. State v.

Gourdine, 322 S.C. 396, 472 S.E.2d 241 (1996), wherein the Supreme Court held, that all of the evidence must be considered when considering whether a lesser-included offense must be charged to the jury. The amending of the armed robbery statute on "representation of a deadly weapon" did not change this principle.

The trial judge erred by refusing to charge the lesser-included offense of strong arm robbery, given the highly unusual facts of this case regarding the videotape, where the clerk present during the robbery was not being called as a witness by the state, and there was the "any evidence" needed to justify strong armed robbery being charged as a verdict option. See S.C. Code § 16-11-330(A); State v. Simmons, 360 S.C. 33, 43-44, 599 S.E.2d 448, 453 (2004); Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999).

CONCLUSION

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



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of August, 2019.

STATE OF SOUTH CAROLINA

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THE STATE,

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DARRELL EUGENE BLACKWELL,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon William M. Blitch, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Darrell Eugene Blackwell, #325994, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 12th day of August, 2019.

By: RMD

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 12th day of August, 2019.

(L.S)
Notary Public for South Carolina
My Commission Expires: July 26, 2028