

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Abbeville County

Honorable Frank R. Addy, Circuit Court Judge

ORIGINAL

THE STATE,

RESPONDENT,

V.

LAWRENCE ORLANDO POSTELL,

APPELLANT.

APPELLATE CASE NO. 2018-001658

INITIAL BRIEF OF APPELLANT

RECEIVED

SEP 18 2019

SC Court of Appeals

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STATEMENT OF ISSUE ON APPEAL

I. Whether the trial court erred in denying Appellant's request for redactions in Appellant's recorded interview with law enforcement, where the prejudicial nature of Appellant noting that he "f-cked up" and was going to be sentenced to life imprisonment substantially outweighed the danger of unfair prejudice?

II. Whether the trial court erred in failing to give Appellant's jury charge on spoliation, where currency which was located in Appellant's possession and contained dried blood was unavailable at trial.

STATEMENT OF THE CASE

Appellant was indicted by an Abbeville County grand jury on July 14, 2017 for burglary in the first degree, criminal sexual conduct in the first degree, attempted murder, kidnapping, and possession of a weapon during the commission of a violent crime. R. ___ (Indictments). Appellant proceeded to trial before the Honorable Frank R. Addy, Jr. on September 4, 2018.¹ Aaron Taylor represented Appellant, and Micah Black and Demetrios Andrews appeared on behalf of the state.

The trial court granted Appellant's motion for a directed verdict on the possession of a weapon during the commission of a violent crime. Tr. II 211, l. 22 – Tr. II 214, l. 25. The jury found Appellant guilty of burglary, the lesser-included offense of criminal sexual conduct in the second degree, and the lesser-included offense of assault and battery in the first degree, and kidnapping. Tr. II 295, l. 21 – Tr. II 296, l. 21. Judge Addy sentenced Appellant to twenty-five years on the burglary and kidnapping charges, twenty years on the criminal sexual conduct charge, and ten years on the assault and battery charge, all concurrent to one another. Tr. II 306, ll. 18 – 25.

This brief follows.

¹ Appellant's trial lasted three days and was transcribed by two different court reporters. The portion of his trial from September 4, 2018 will be referred to as Transcript I. The September 5 – 6, 2018 portion will be referenced as Transcript II.

ARGUMENT

I. The trial court erred in denying Appellant’s request for redactions in Appellant’s recorded interview with law enforcement, where the prejudicial nature of Appellant noting that he “f-cked up” and was going to be sentenced to life imprisonment substantially outweighed the danger of unfair prejudice.

Standard of Review

“The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice.” State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” Id. at 429–30, 632 S.E.2d at 848.

Relevant facts

Quintavious Calhoun was arrested on the charges of burglary in the second degree, distribution of crack, and domestic violence in April 2017. Tr. II 109, ll. 12 – 24. The complainant in the burglary and domestic violence cases was Lori Bonds, Calhoun’s girlfriend. Id. While incarcerated at the jail but prior to being sentenced, Calhoun directed Bonds to sell crack and take the money to his grandparents. Tr. I 85, l. 14 – Tr. I 87, l. 2; Tr. I 137, ll. 22 – 24. Bonds made four separate sales after speaking with Calhoun. Tr. I 87, ll. 3 – 7.

Later that evening, Bonds took an Ambien and went to sleep. Tr. I 89, ll. 3 – 14. She woke up and allegedly saw Appellant in her home. Tr. I 89, l. 15 – Tr. I 90, l. 8. Bonds knew who Appellant was and noted that Calhoun always called him “Boogie.” Tr. I 90, ll. 21 – 25.

Bonds claimed Appellant strangled and sexually assaulted her. Tr. I 92, l. 11 – Tr. I 99, l. 2. Bonds ran to a neighbor’s house, and the neighbor called 911. Tr. I 141, l. 4 – Tr. I 142, l. 8.

Appellant was arrested after Bonds identified him in a photographic line-up. Tr. II 91, ll. 15 – 18. On May 8, 2017, Appellant was interviewed by law enforcement. Tr. II 94, ll. 10 – 24. The interview was played to the jury. Tr. II 98, l. 18 – Tr. II 99, l. 24. At Appellant’s trial, Bonds testified that she believe Calhoun sent Appellant to her house: “I felt like Quint probably sent him up there because he sent him up the week before threatening me.” Tr. I 132, ll. 20 – 24.

Prior to the start of Appellant’s trial, an objection was lodged as to multiple portions of the recorded interview. Tr. I 58, l. 12 – Tr. I 62, l. 4. In the tape, law enforcement repeated Appellant’s prior statements of “I f-cked up. I’m going to get life.” R. ___ (Court’s Exhibit 2: Unredacted Interview of Defendant Postell). The state characterized this as an admission of guilt. Similarly, Appellant could be heard saying “[I am] [a]bout to be gone for the rest of my life.” Tr. I 59, ll. 4 – 15. Later in the video, Appellant said “F-cked up. Going to get life.” Id. Counsel for Appellant objected to those portions and requested that they be redacted:

I mentioned this earlier, the same terminology about the prejudicial value weighed against the probative value. I mean - - I guess, you may want to watch that interview, Judge. It was one of those - - I mean, I think you can see some of the previous statements that we’re willing to redact. These are people that know each other. I think he sort of - - and, again, you can look at it yourself. Some of these, it was more of a question, so I’m going to get life? That’s our opinion on it.

Obviously, it does - - he does say those things, I just don’t - - I think there’s a lot of prejudicial value to that stuff. And, obviously, it doesn’t say what he’s admitting to.

So, in other words, if the State, if he wasn’t charged with attempted murder, he would say, well, I’m guilty of assault. But my point being is, I know what that means, what he’s admitting to. He doesn’t say what charge he says he did. What did he F up about. Was he agreeing with all of what the officer is confirming with, a few things. There’s just no clarification as to what it is.

So, anyway, I think it's pretty clear, Judge. We can get into more formal arguments at the appropriate time, but those are some [redactions] that I do agree with.

Tr. I 60, l. 1 – Tr. I 61, l. 3. The trial court took the matter under advisement. Tr. I 61, ll. 13 – 23.

During trial, Appellant again objected to four specific portions of the interview with law enforcement and sought redaction. Tr. I 151, l. 5 – Tr. I 153, l. 1. Each of the four objectionable sections contained statements by Appellant which were significantly more prejudicial than probative. Appellant correctly argued that the jury would likely “get confused and say, well, he’s admitting to every single crime that he’s charged with, and therefore, he’s guilty, which is not what he was getting at.” Id.

The trial court agreed with the state’s position that “these statements could be interpreted as an admission of culpability at least with respect to the assaults.” Id. The trial court ruled that “clearly, he’s admitting culpability to doing something wrong by making those statements, so the Court will be allowing the solicitor to play those portions to the jury subject to your objection.” Id. As previously noted, the interview was played for the jury. Tr. II 99, ll. 23 – 24.

Discussion

“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Rule 403, SCRE. The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case. State v. Brooks, 341 S.C. 57, 533 S.E.2d 325 (2000). Evidence is unfairly prejudicial if it has an undue tendency to suggest a

decision on an improper basis, such as an emotional one. State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146 (1991).

The hearsay exception allowing statements against penal interest requires trial judge to view disputed evidence in light of surrounding circumstances and discern whether each particular remark is plainly self-inculpatory. State v. Barnes, 421 S.C. 47, 804 S.E.2d 301 (Ct. App. 2017).

Appellant's self-critical remarks did not constitute an admission of guilt. Admission of those prejudicial statements contradicted and undermined Appellant's claims of innocence. The state misread and misapprehended Appellant's comments, and the jury likely misinterpreted them as well. They should have been excluded as unduly prejudicial, with the prejudice substantially outweighing any probative value. Expressing self-criticism, such as "I f-cked up" does not imply legal culpability and therefore should not be admissible under a hearsay exception. Appellant's blunt observation is not tantamount to an admission of guilt; messing up is not the same as committing a crime. Appellant could have meant a number of other things when he quipped "I f-cked up." He was in an orange jumpsuit speaking with law enforcement officers. He understandably believed that he had somehow messed up. However, he was still innocent until a jury found him guilty, and the admission of those prejudicial remarks had little probative value.

Appellant worried aloud about potentially being sentenced to life. It was not unreasonable for him to be concerned. As defense counsel noted, Appellant's verbalized thoughts were likely questions rather than statements. Accordingly, they could not be considered admissions of guilt and should have been excluded.

II. The trial court erred in failing to give Appellant's jury charge on spoliation, where currency which was located in Appellant's possession and contained dried blood was unavailable at trial.

Standard of Review

"An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." State v. Williams, 367 S.C. 192, 195, 624 S.E.2d 443, 445 (Ct. App. 2005). "The requesting party must have been prejudiced by the trial court's failure to give the instruction in order to warrant reversal on appeal." Id. at 195-96, 624 S.E.2d at 445.

Relevant facts

On May 5, 2017, Doug Partain, an officer with the Abbeville County Sheriff's Department, arrested Appellant and executed a search warrant on his property. Tr. II 42, l. 5 - Tr. II 46, l. 11. While arresting Appellant, Partain found money in his pocket; he turned it over to an investigator. Id. Dried blood was found on the currency. Id. The money could not be located during Appellant's trial. Tr. II 47, ll. 4 - 5.

Jeffrey Hines, a different officer with the Abbeville County Sheriff's Office, testified that the jail gave the money back to Appellant's mother. Tr. II 117, ll. 9 - 17. Hines admitted that SLED had not tested the currency to determine whose blood was on it. Tr. II 117, ll. 23 - 25.

Counsel for Appellant offered a proposed jury charge on spoliation:

I've handed that up to the Court, my request for spoliation charge. I mean, our opinion is that some of the evidence was - - even though I know it was purposely done so it wasn't lost or destroyed, the money with the blood with it was given - - was deposited, it's gone, and then I think a check was written to my client's mom. I don't know. That's kind of the point. We don't know what was - - I know blood was on there. Would it have helped us? We don't know. That something we'd ask that you address with the jury, that any evidence that was destroyed or

lost, misplaced, et cetera, that could have been in our favor, and as I set out in the spoliation request, [Reeves].²

Tr. II 216, l. 11 – Tr. II 218 l. 18; R. ___ (Court’s Exhibit 3: Request for Jury Instruction). The request noted that “[d]ue process demands that the State preserve potentially exculpatory evidence which it failed to do in this case.” Id. Therefore, Appellant requested the following charge:

When evidence is lost or destroyed by a party, you may infer that the evidence which was lost or destroyed by that party would have been adverse to that party. In other words, if one party loses or destroys evidence, you may infer that the lost or destroyed evidence would have been favorable to the other side.

Id.

Discussion

“The trial judge is required to charge only the current and correct law of South Carolina.” State v. Jenkins, 408 S.C. 560, 569, 759 S.E.2d 759, 764 (Ct. App. 2014) (quoting State v. Brown, 362 S.C. 258, 261, 607 S.E.2d 93, 95 (Ct. App. 2004)).

The trial judge in Appellant’s case suggested that the “presence of blood on the currency” was not “terribly material in light of the other evidence which has been presented” and denied Appellant’s request for the charge. Tr. II 217, l. 24 – Tr. II 218, l. 18. Based upon the “relatively collateral nature of the money issue in this particular case,” the request was denied.

The standard for charging the jury is not whether evidence was “terribly material.” Law enforcement was in possession of evidence relevant enough to be mentioned at trial; that money should have been preserved. The failure to do so should have triggered a spoliation charge. Although adverse inference charges are rarely permitted in criminal cases, counsel for Appellant requested an instruction which had been given in Reaves, supra. The trial court erred by failing

² State v. Reaves, 414 S.C. 118, 777 S.E.2d 213 (2015).

to give it in Appellant's case. Without the benefit of an adverse inference charge, the state was allowed to elicit testimony about Appellant being arrested with bloody money in his possession. The currency was not tested by SLED or in the possession of law enforcement at the time of Appellant's trial. The requested spoliation charge was correct based upon law at the time of Appellant's trial, and the trial court's reasoning for not instructing the jury was erroneous and prejudiced Appellant.

CONCLUSION

Based upon the foregoing, Appellant respectfully requests this Court reverse his convictions and remand for a new trial.

A handwritten signature in black ink, appearing to read "Taylor D Gilliam", written over a horizontal line.

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR APPELLANT

This 18th day of September, 2019.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Honorable Frank R. Addy, Circuit Court Judge

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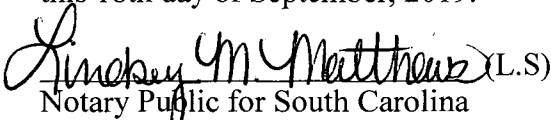
CERTIFICATE OF SERVICE

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. Blich, 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 Lawrence Orlando Postell, #309383, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 18th day of September, 2019.



Taylor D. Gilliam
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 18th day of September, 2019.

 (L.S)
Notary Public for South Carolina

My Commission Expires: October 22, 2024.