STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Anderson County
The Honorable J.C. Buddy Nicholson, Circuit Court Judge

Appellate Case No. 2018-001892

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

DARRELL EUGENE BLACKWELL,

APPELLANT.

INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The trial judge properly admitted Appellant's recorded statement into evidence because the non-testifying officer's statements were not hearsay or a violation of the Confrontation Clause because his statements in the recording were not utilized as evidence against Appellant. Regardless, any error in the admission of the statements is harmless given the overwhelming evidence of Appellant's guilt, including the video recording of the crime.

II. The trial judge properly refused to charge the jury on the lesser-included offense of strong arm robbery because the undisputed evidence at trial showed Appellant robbed his victims using either a real weapon or a convincing representation thereof.

STATEMENT OF THE CASE

In March of 2016, an Anderson County grand jury indicted Appellant for armed robbery. On October 8–9, 2018, Appellant proceeded to a jury trial before the Honorable J.C. Buddy Nicholson. Hadden Lucas, Esquire, and Gordon Senerius, Esquire represented Appellant; Assistant Solicitors Catherine Huey, Esquire, and Stat Overby, Esquire, represented the State. The jury found Appellant guilty as charged. The trial judge sentenced Appellant to eighteen years' incarceration.

Appellant timely filed a notice of appeal and an initial brief. This brief of Respondent now follows.

STATEMENT OF FACTS

Prior to trial, an audio recording of Appellant's interview with police was proffered by the State during a Jackson v. Denno hearing. Investigator Scotty Hill was present during the entirety of Appellant's interview, although Detective Jamie Garrett primarily interacted with Appellant. Investigator Hill testified Appellant agreed to the questioning. Investigator Hill testified Detective Garrett never mislead Appellant about the information in law enforcement's possession. During the interview, Appellant admits to robbing the store that day, confirming that it was him captured on surveillance cameras within the store and claiming that the gun he used was a toy gun he found." (Tr.p.53, line 13–Tr.p.69, line 16; State's Exhibit 2-A)

Trial counsel objected to admission of the audio recording, arguing it should be suppressed on the basis of Appellant not being "a sophisticated man" and that he was "led along through a confession" without first viewing the surveillance video of the robbery. Based on this limited objection, the trial motion denied the motion to suppress. (Tr.p.69, line 17–Tr.p.70, line 25)

On January 9, 2016, the Shop Rite convenience store was robbed. Officer Rhonda Phillips responded to the scene of the robbery and met with the two witnesses to the crime. The witnesses reported a bearded white male left the scene of the crime in a white van. She also collected a copy of the surveillance video for the investigation. Deputy Craig Holbrooks watched the video that night and placed it into storage at the Anderson County Sheriff's Office. Additionally, he made a copy of it for trial and confirmed the video used by the State was the same one he reviewed that night. Deputy Holbrooks noted that the person in the video was shown holding a knife and gun in the video. (Tr.p.79, line 4–Tr.p.102, line 15; State's Exhibits 4–11)

Lieutenant Robert Gebing noted that after other officers were unable to identify the suspect in the video, the sheriff's office reached out to local media in an attempt to generate potential tips. Appellant's brother, Mark Steven Blackwell, recognized him and informed police of his identity. Following the tip, Lieutenant Gebing and Detective Garrett went to the homes at 202 and 203 Gilbert Street, which they were informed were residences occupied by Johnnie Taylor, Appellant's mother, and Appellant. Upon arriving, officers observed a white van outside which matched the description of the vehicle used in the robbery. Taylor spoke with the officers and showed them around her home, during which time they saw several items of clothing similar to those worn by the suspect in the surveillance video. Taylor gave officers permission to collect the clothing. (Tr.p.104, line 17–Tr.p.122, line 13; Tr.p.134, line 6–Tr.p.138, line 11; Tr.p.169, line 20–Tr.p.173, line 23; State's Exhibits 15–19)

Investigator Kenneth Pigman accompanied Investigator Garrett while he executed search warrants on both the 202 and 203 Gilbert Street homes. Again, the white van was observed outside the home and the men photographed it. The men also located a brown stocking cap behind the 203 Gilbert Street residence. At 202 Gilbert, the officers found two unopened packs of Seneca cigarettes—the brand of cigarette stolen from the convenience store—and black jacket with an attached gray hood. Both the hat and jacket matched those worn by the suspect in the surveillance video. (Tr.p.154, line 17–Tr.p.168, line 8; State's Exhibits 22, 26)

Investigator Scotty Hill testified he was one of two officers present at Appellant's interview, and was there for the entirety of it. Investigator Hill noted Appellant's statements to police were intelligently, knowingly, and voluntarily made. (Tr.p.175, line 5–Tr.p.183, line 4)

Trial counsel objected to the admission of the statement, claiming that Investigator Garrett's failure to testify at trial was a violation of Appellant's Sixth Amendment right to

confront his accusers. Citing to State v. Brewer, 411 S.C. 401, 768 S.E.2d 656 (2015), counsel claimed any statement made by Investigator Garrett during the interrogation was hearsay and were "clear[ly]" offered for truth and not non-hearsay purposes. Trial counsel also claimed it was important to exclude Garrett's statements because they were "offered for context" as to8 Appellant's statements to police. (Tr.p.183, line 5–Tr.p.189, line 13)

The State disagreed with trial counsel's objection and explained the facts of its case were opposite those of Brewer because it redacted any and all of Investigator Garrett's statements in which he referenced what any other person, including Appellant's mother, said to officers.[1] The remaining portion of the recording only included Investigator Garrett's questions to Garrett and his explanations of what officer's found, including the content of the security footage also played at trial. The State further explained the recording was not being admitted for the "truth" in Garrett's unredacted comments in the tape; Garrett's statements were present merely to provide context for Appellant's admissions to police. Trial counsel noted that he had gone over the recording with the State and agreed upon portions of it which needed redaction in order to avoid the confrontation clause and hearsay issues; counsel clarified its position was that the video, in general, should be inadmissible because "all statements by Investigator Garrett [were] inadmissible hearsay" violating the confrontation clause, and the statement was not freely and voluntarily given, (emphasis added). The trial judge, noting Garrett's hearsay statements were redacted, found Brewer did not apply and denied trial counsel's motion. (Tr.p.189, line 14–Tr.p.197, line 12; State's Exhibit 2-A)

[1] Although unrelated to this Appeal, the State also redacted references to Appellant's history of drug usage, usage of drugs the night of the robbery. The State provided a description of all redacted materials via argument and reference to printed transcript of the recording. (Tr.p.193, line 20–Tr.p.195, line 1) (Court's Exhibit 1)

At the conclusion of the trial, trial counsel requested a charge on the offense of strong arm robbery because during Appellant's interview, he did not recall having a knife with him and claimed the gun he used was a not a lethal firearm, but an expensive toy gun he found sometime before the crime. The solicitor argued the recording on the crime clearly demonstrated Appellant possessed a knife and that Appellant did not dispute using a toy gun during the crime, rendering a strong arm robbery charge inappropriate for jury consideration. The trial judge denied the motion. (Tr.p.219, line 19–Tr.p.223, line 1; Tr.p.247, line 17–Tr.p.249, line 5)

STANDARD OF REVIEW

"In criminal cases, an appellate court reviews errors of law only and is bound by the factual findings of the trial court unless clearly erroneous." State v. Bryant, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007). "The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed in the absence of a prejudicial abuse of discretion. Id. "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." Id.

ARGUMENT

I.

The trial judge properly admitted Appellant's recorded statement into evidence because the non-testifying officer's statements were not hearsay or a violation of the Confrontation Clause because his statements in the recording were not utilized as evidence against Appellant. Regardless, any error in the admission of the statements is harmless given the overwhelming evidence of Appellant's guilt, including the video recording of the crime.

Appellant argues the trial judge erred in admitting Garrett's recorded statements because his unavailability as a witness rendered those statements as inadmissible violations of the Confrontation Clause and hearsay rules. The State disagrees with these allegations of error. Garrett's statements were used as evidence or for any "truth" therein and thus did not violate rules. Further, any alleged error in the admission of the recorded statements were harmless given the overwhelming evidence of Appellant's guilt, including the video recording of the crime which showed his face while he robbed the store.

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." State v. Black, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." State v. Jennings, 394 S.C. 473, 477–78, 716 S.E.2d 91, 93 (2011).
A defendant demonstrates a Confrontation Clause violation when he is prohibited from engaging in otherwise appropriate **cross-examination** designed to show a prototypical form of bias . . . from which jurors . . . could draw inferences relating to the reliability of the witness." State v. Gracely, 399 S.C. 363, 372, 731 S.E.2d 880, 884 (2012) (emphasis added).

"The right to meaningful cross-examination of an adverse witness is included in the defendant's Sixth Amendment right to confront his accusers. This does not mean, however, that

trial courts conducting criminal trials lose their usual discretion to limit the scope of cross-examination. On the contrary, 'trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such **cross-examination** based on concerns about, among other things, harassment, prejudice, confusion of the issues, witness' safety, or interrogation that is repetitive or only marginally relevant." State v. Aleskey, 343 S.C. 20, 33, 538 S.E.2d 248, 255 (2000) (citing Delaware v. Van Arsdall, 475 U.S. 673 (1986)) (emphasis added).

"The principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence **against the accused**." Crawford v. Washington, 541 U.S. 36, 50 (2004) (emphasis added). Generally speaking, the Confrontation Clause guarantees an opportunity for effective **cross-examination**, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. Delaware v. Fensterer, 474 U.S. 15, 20 (1985) (emphasis added).

In South Carolina, hearsay is inadmissible "except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute." Rule 802, SCRE. Our rules of evidence define hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. Admissions by a party opponent offered again him in criminal proceeding are not hearsay. See Rule 801(d)(2), SCRE.

Importantly, a statement that is not offered to prove the truth of the matter asserted should not be excluded as hearsay. See State v. Blackburn, 271 S.C. 324, 247 S.E.2d 334 (1978) (statement implicating defendant in alleged prior crimes, which was not offered to prove the truth of the matter asserted, that is, that defendant in fact committed the prior crimes, but to

establish motive, was not "hearsay" and its admission was not error); Hawkins v. Pathology Assocs. of Greenville, P.A., 330 S.C. 92, 498 S.E.2d 395 (Ct.App.1998) (allowing admission of letters, an anniversary card, and video to show close familial bond between the decedent, her husband, and her children in a malpractice action). Evidence of an out of court statement offered to prove the effect on a person hearing the statement is outside of the definition of hearsay because the statements are not offered to prove their truth. Watson v. Wall, 239 S.C. 109, 121 S.E.2d 427 (1961).

Further, non-assertive statements or conduct is not hearsay. See Danny R. Collins, South Carolina Evidence, Section 16.6, pp. 487- 488, (2nd ed., S.C. Bar 2000). Several categories of statements as non-assertive include questions and exclamation. Id. A question is not hearsay because it is not assertive. State v. Johnson, 324 S.C. 38, 476 S.E.2d 681 (1996). "An inquiry is not an 'assertion,' and accordingly is not and cannot be a hearsay statement." Inc. Pub. Corp. v. Manhattan Magazine, Inc., 616 F.Supp. 370, 388 (S.D.N.Y.1985), aff'd, 788 F.2d 3 (2d Cir.1986). Because a question cannot be used to show the truth of the matter asserted, the dangers necessitating the hearsay rule are not present. See United States v. Detrich, 865 F.2d 17, 20–21 (2d Cir.1988).

In State v. Brewer, 411 S.C. 401, 768 S.E.2d 656 (2015), the Supreme Court of South Carolina found an officer's portion of an audio recorded interview constituted inadmissible hearsay evidence. The court's ruling focused on the fact that investigators frequently referenced and quoted purported eyewitnesses to the defendant shooting the victims. Id. at 406–07, 768 S.E.2d at 659. The court found the challenged statements were offered solely in an attempt to prove the truth of Brewer shooting the victims because Appellant never incriminated himself during the recording and repeatedly denied shooting anyone; the only information in the

recording pertaining to guilt were the investigator's hearsay statements. Id. at 407, 768 S.E.2d at 659. However, the court "emphasize[d] that [its] decision [was] not a categorical rule that any statement by an investigator during an interrogation is inadmissible at trial," but a decision indicating such out-of-court statements are either admissible as valid non-hearsay statements or, if hearsay, under one of the exceptions to the rule. Id. at 407–08, 768 S.E.2d at 659.

The present case is quite distinguishable from Brewer. In fact, the parties and the trial judge discussed Brewer and applied its logic to the redaction of Appellant's audio statement. The State made sure to redact the portions of the recording in which the investigator referenced any statements made by other witnesses. Such behavior is opposite of that which occurred in Brewer, in which the only substantive information within the recording was the officer's recitation of what other people told police. Id. at 407, 768 S.E.2d at 659.

Further, Garrett's recorded statements were not hearsay because they were not submitted for the truth of the matter asserted. Investigator Garrett's questions were not submitted as proof of Appellant's guilt; trial counsel conceded at trial that Garrett's statements were "offered for context." Investigator Garrett informed Appellant of information within investigators' possession, but gave Appellant the opportunity to contradict the information and explain what occurred. Investigator Garrett's questions, including those pertaining to a possible coconspirator,[2] were not part of the State's case against Appellant and the State did not present any information regarding these statements and questions at trial. The questions were only played to the jury because they were reference points for the incriminating admissions made by

[2] As noted by Appellant, officers were initially investigating the possibility that Appellant may, to some extent, have committed the crime with some degree of cooperation with "Sherry," a clerk working at the robbed store the night in question who left shortly before the crime. (Br. of Appellant, p.12). However, this was not a claim pursued at trial; the State did not contradict this claim nor was Appellant charged with criminal conspiracy. Thus, the truth of such assertions was irrelevant to Appellant's trial and ultimate conviction.

Appellant. Both at trial and now, Appellant has been unable to identify any "truth" in Garrett's statements used in his prosecution.

Additionally, the admission of Garrett's statements was not a violation of the Confrontation Clause. Again, as noted above, Garrett's statements were not submitted as evidence or proof of Appellant's guilt; thus there was no witness to "confront" on cross-examination . See Crawford, 541 U.S. at 50.

Accordingly, the trial judge properly admitted Garrett's statements from the audio recording.

Harmless Error

Even if improper hearsay evidence is admitted, any error in the admission of the hearsay evidence is subject to a harmless error analysis and only warrants reversal if it results in actual prejudice. State v. Weston, 367 S.C. 279, 288, 625 S.E.2d 641, 646 (2006). Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). After an error is found, the appellate court must then review the other evidence considered at trial besides the erroneously admitted evidence. State v. Baccus, 367 S.C. 41, 55, 625 S.E.2d 216, 223 (2006). Error is harmless beyond a reasonable doubt if it does not contribute to the verdict. State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008).

In the instant case, even without redactions to the recording of Appellant's statement to police, the overwhelming evidence demonstrates his guilt. Notably, Appellant's own statements of guilt, including his admission to going to the gas station that night and possessing the "gun" would still be admissible in a retrial. Further, Appellant does not dispute the admissibility of the video recording of the armed robbery or the images taken therefrom which show his face and clearly identify him as the culprit of the crime. Alone, these items would leave no doubt as to his

guilt, but they are also supported by the circumstantial evidence collected by the officers, including cigarettes matching the brand of those stolen and pieces of clothing identical to those worn by the robber. Accordingly, any alleged error in the admission of the investigator's statements within the recording must be harmless given the substantial evidence of Appellant's guilt. See Fletcher, 379 S.C. at 25, 664 S.E.2d at 484.

II.

The trial judge properly refused to charge the jury on the lesser-included offense of strong arm robbery because the undisputed evidence at trial showed Appellant robbed his victims using either a real weapon or a convincing representation thereof.

Appellant argues the trial judge erred in refusing to charge the jury on the offense of strong arm robbery. The State disagrees with this allegation of error because the only evidence at trial indicated Appellant robbed the store with either real weapons or items he represented as such. Thus there was no evidence Appellant was guilty of strong arm robbery and not armed robbery.

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). The law to be charged to the jury is determined by the evidence presented at trial. State v. Holland, 385 S.C. 159, 165, 682 S.E.2d 898, 901 (Ct. App. 2009). "No instruction should be given by the trial judge, at the request of the appellant, which tenders an issue which is not presented or supported by the evidence." State v. Weaver, 265 S.C. 130, 137, 217 S.E.2d 31, 34 (1975). "Ordinarily, the trial court has the duty to give requested instructions which correctly state the law applicable to the issues and which are supported by the evidence." State v. Peer, 320 S.C. 546, 553, 466 S.E.2d 375, 380 (Ct. App. 1996). The trial court only commits reversible error if it fails to give a requested charge on an issue raised by the evidence. State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 838, 849 (1993).

"A trial judge is required to charge the jury on a lesser-included offense if there is evidence from which it could be inferred the lesser, rather than the greater, offense was committed." State v. Green, 397 S.C. 268, 289, 724 S.E.2d 664, 674 (2012). "The 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 tends 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). In reviewing a trial judge's jury instructions, the appellate court must view the jury charge as a whole and in light of the evidence and issues from trial. State v. Simmons, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009). An appellate court will not reverse a trial judge's decision regarding a jury charge absent an abuse of discretion. State v. Santiago, 370 S.C. 153, 159, 634 S.E.2d 23, 26 (Ct. App. 2006).

Pursuant to S.C. Code Ann. § 16-11-330(A) a person is guilty of armed robbery if he or she commits a robbery "while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon." Additionally, a person is also guilty of armed robbery if he does not use one of the items listed above, but alleges, "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 robbery reasonably believed to be a deadly weapon.

In the instant case, the trial judge properly denied Appellant's request to charge strong arm robbery because all evidence presented indicated Appellant, at the very least, was armed with a toy gun when he committed the robbery. In the recording of the robbery, Appellant is seen holding both a knife and a gun-shaped object and extending them towards the store clerk operating the register, who then flees. In his audio-recorded statement, Appellant did not recall using a knife but did admit to using a gun like object; Appellant described the item as a high-quality toy worth several hundred dollars. The only evidence presented at trial indicated Appellant was armed with actual weapons or items which appeared to be such, both of which are defined as armed robbery under South Carolina law. See S.C. Code Ann. § 16-11-330. Because

the only evidence presented indicated Appellant's actions were armed robbery, the trial judge properly refused to charge the jury on the offense of strong arm robbery.

CONCLUSION

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

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January 2, 2020

STATE OF SOUTH CAROLINA
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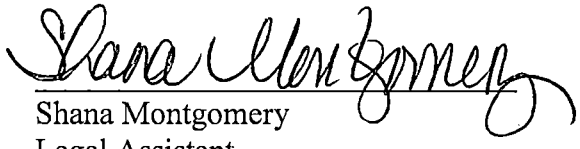
APPELLANT.

PROOF OF SERVICE

I, Shana Montgomery, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by sending two copies of the same to:

Robert M. Dudek, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served this 2nd day of January, 2020.



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RE: State v. Darrell Eugene Blackwell – Appellate Case No. 2018-001892

Dear Mr. Dudek:

I am enclosing two copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

William F. Schumacher
Assistant Attorney General
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JAN 02 2020
SC Court of Appeals

WFS/ssm
Enclosures

cc: Honorable Jenny A. Kitchings
(original and one enclosed)
Victim Advocacy Division