STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Charleston County
Roger L. Couch, Circuit Court Judge

Opinion No. 5773 (S.C. Ct. App. filed October 7, 2020)

THE STATE,

PETITIONER,

V.

MACK SEAL WASHINGTON,

RESPONDENT

APPELLATE CASE NO. 2020-001436

RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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PETITIONER'S QUESTION PRESENTED

Did the Court of Appeals err by holding the trial judge erroneously admitted hearsay evidence which improperly shifted the burden of proof to Washington when the issues of hearsay and burden shifting were not properly preserved for appellate review and, even if they were, none of the statements made by Detective McCauley during his interview of Washington were actually hearsay or shifted the burden of proof to Washington? Further, even assuming McCauley's statements during the interview were hearsay or shifted the burden of proof to Washington, did the Court of Appeals nonetheless err by reversing Washington's convictions when any possible error in the admission of the statements was harmless beyond a reasonable doubt since the statements were cumulative to other evidence presented and the evidence of Washington's guilt was overwhelming?

RESPONDENT'S COUNTER QUESTION PRESENTED

Did the Court of Appeals correctly determine the trial judge erred by admitting out-of-court statements made by a law enforcement officer during an audio-recorded interrogation where the statements improperly shifted the burden to Respondent, particularly, where the statements expressed the officer's opinion that Respondent was guilty, and the state's case relied upon circumstantial evidence?

STATEMENT OF THE CASE

On August 21, 2015, Sarah Corbin arrived home to find that her interior laundry room door was damaged. R. 33, l. 7 – R. 34, l. 5. Corbin left the home, calling the police and her husband, Lawrence Collins. R. 34, ll. 6-13.

Upon receiving Corbin's call, Collins returned home. R. 38, ll. 10-19. Collins noticed the side door leading from outside into the garage had been damaged. R. 38, ll. 21-23; R. 39, ll. 23-25. Inside the garage, pressed against the side door, was a stackable washer and dryer. R. 43, ll. 8-12; R. 43, ll. 19-22. The washer and dryer were damaged as well. R. 44, ll. 8-18. The unit had been pushed away from the side door. R. 44, ll. 15-18. Collins claimed a Husqvarna brand weed eater with a "chain saw on a stick" was missing from the garage. R. 48, ll. 7-15.

Collins also saw damage to the door leading from the garage into the house. R. 49, l. 18 – R. 50, l. 3. Collins claimed several items were missing from inside his home: "rifle, pistol, and change jar." R. 51, ll. 17-21. The rifle was sitting on an antique cabinet in the living room. R. 51, l. 22 – R. 52, l. 11. The pistol was taken from the closet in the master bedroom. R. 52, ll. 12-15. Additionally, the change jar was taken from the bedroom closet. R. 52, ll. 23-25.[1] Although Collins had "12, 15 guns" in the house, those were not stolen. R. 52, ll. 4-5; R. 52, ll. 18-22; R. 64, l. 21 – R. 65, l. 3; R. 82, ll. 19-24.

During the investigation, the police recovered a single fingerprint from the stackable washer and dryer. R. 74, l. 24 – R. 75, l. 8. When the latent print was loaded into AFIS, thirty possible matches were generated. R. 122, l. 20 – R. 123, l. 9. However, the fingerprint examiner received only one of those candidates to use for analysis. R. 123, ll. 10-12. The examiner

[1] Collins did not report the missing change jar to the police. R. 82, ll. 6-14.

opined that the latent impression "was created by the number 6 left thumb off the fingerprint card" associated with Respondent. R. 112, ll. 10-15.

After the police learned of the fingerprint analysis, Respondent became a suspect in the burglary. R. 146, ll. 16-24. However, neither Corbin nor Collins knew Respondent. R. 34, ll. 16-17; R. 59, ll. 14-16; R. 59, l. 25 – R. 60, l. 9. Thereafter, an officer searched a pawn shop database for Respondent's name. R. 146, l. 25 – R. 147, l. 8. According to the officer, the search revealed that on August 21, 2015, Respondent "had pawned two items that were similar in make and model to what were stolen from the burglary." R. 147, ll. 9-13. Those items were a Winchester rifle and a Husqvarna weed eater. R. 147, ll. 14-19. The police never obtained the pawned weed eater, and the police never found the allegedly stolen pistol or change jar. R. 147, ll. 21-25.

Collins claimed he had owned the stolen rifle for four generations, and that he could recognize it on sight. R. 53, ll. 1-4.[2] Despite such alleged familiarity with the rifle, Collins told the police it was manufactured by Savage, but when a Winchester was recovered, he claimed it was the stolen gun. R. 53, ll. 5-18; R. 66, ll. 7-9; R. 81, ll. 12-22. In fact, on January 27, 2016, Collins met a police officer at a pawn shop in West Ashley where he claimed the pawned Winchester rifle was the one stolen from his home on August 21, 2015. R. 56, l. 23 – R. 57, l. 2; R. 66, ll. 19-23. Although the police told Collins to go to a pawn shop in North Charleston because a weed eater had been pawned, Collins did not go to the shop. R. 58, l. 20 – R. 59, l. 3; R. 66, l. 24 – R. 67, l. 4.

On September 12, 2016, a Charleston County grand jury indicted Respondent for burglary in the first degree (2016-GS-10-5383), malicious injury to personal property (2016-GS-

[2] Collins did not report to the police that the rifle had a "unique" engraving on the barrel. R. 82, ll. 1-3.

10-5386), and obtaining goods by false pretenses (2016-GS-10-5387). R. 213-214; R. 216-217; R. 219-220. The state, represented by Daniel Poulos, called the case for trial on April 17-18, 2017, before the Honorable Roger L. Couch and a jury. R. 1. Luke Malloy, III, represented Respondent. R. 1. The jury found Respondent guilty as charged. R. 200, ll. 14-25. Judge Couch sentenced Respondent to fifteen years' imprisonment for burglary and to ten years' imprisonment for each property crime offense. R. 201, ll. 13-16; R. 215; R. 218; R. 221. He ordered the sentences to be served concurrently. R. 201, ll. 16-17; R. R. 215; R. 218; R. 221. On April 21, 2017, Respondent served his notice of appeal. On appeal, Respondent challenged statements made by law enforcement during the audio-recorded interrogation of Respondent because the officer's out-of-court statements concerned improper opinion evidenced and shifted the burden of proof to Respondent.

The Court of Appeals reversed Petitioner's convictions and remanded for a new trial. App. 264-271. The majority held several statements made by the police officer during the interrogation were hearsay that improperly shifted the burden of proof to Respondent. App. 264-271. Thereafter, the state filed a petition for rehearing. App. 272-284. On October 7, 2020, the Court of Appeals granted the state's petition for rehearing, dispensed with further briefing, and substituted a new opinion. State v. Washington, 431 S.C. 619, 848 S.E.2d 794 (Ct. App. 2020); App. 286-295. In the refiled opinion, the Court of Appeals maintained that Respondent's convictions were reversed, but acknowledged this Court "did not create a 'categorical rule' that any statement made by a police officer during an interrogation is inadmissible." Washington, 431 S.C. at 623, 848 S.E.2d at 796; App. 286-295. On October 29, 2020, the state filed a petition for writ of certiorari. This return follows.

ARGUMENT

The Court of Appeals correctly determined the trial judge erred by admitting out-of-court statements made by a law enforcement officer during an audio-recorded interrogation where the statements improperly shifted the burden to Respondent, particularly, where the statements expressed the officer's opinion that Respondent was guilty, and the state's case relied upon circumstantial evidence.

On March 24, 2016, the police interrogated Respondent regarding the burglary of the home shared by Corbin and Collins. R. 151, ll. 5-6. Prior to trial, defense counsel moved to redact offending portions of the interrogation where the officer shifted the burden to Respondent and opined on Respondent's guilt. R. 13, ll. 15-24; R. 14, ll. 3-11; R. 202; R. 203-211. Defense counsel argued the officer gave "opinions as to strength of the evidence" and "opinions as to the truthfulness of" Respondent. R. 14, ll. 3-11. The officer repeatedly opined a fingerprint found in the burgled home belonged to Respondent. R. 15, ll. 8-10; R. 15, ll. 5-8. When the officer discussed the pawn tickets, the officer's statements were hearsay and improperly bolstered the testimony of the pawn shop dealers. R. 15, ll. 9-16. Most offensively, the officer's statements were "his opinion as to the ultimate question of fact." R. 15, ll. 17-20. Defense counsel argued that the officer's statements improperly bolstered the testimony of the state's proposed fingerprint examiner and the custodian of pawnshop tickets. R. 15, ll. 5-11; R. 15, ll. 15-16. Finally, defense counsel argued the officer's statements were hearsay. R. 15, l. 9; R. 15, ll. 14-15. During the interrogation, the officer opined on "the ultimate question of fact in this case," "whether or not [Respondent] committed this burglar." R. 15, ll. 17-20. Based on these reasons, defense counsel moved to redact the audio statement offered by the state. R. 15, ll. 20-21.

The judge agreed to redact certain portions of the audio, but left many offending portions for the jury to hear. The judge permitted the officer to say, "It's not possible because you pawned it the same day you broke into the house." R. 16, ll. 22-25. Additionally, the judge refused to redact the officer saying, "There's no ifs, ands and buts about it." R. 17, ll. 13-15. Repeatedly, the officer challenged how Respondent could be at work when his fingerprints were in the house and required Respondent to explain. R. 17, ll. 16-21. Most pointedly, the officer told Respondent that he would "have to explain why [his] fingerprints were at the house." R. 18, ll. 4-5. Additionally, the judge allowed the jury to hear the officer's opinion regarding Respondent's fingerprint being inside the house. R. 18, ll. 6-10. The ruling permitted the jury to hear the officer's opinions regarding Respondent pawning items and offering, what the officer considered, unsatisfactory answers for the pawning of the items. R. 18, ll. 8-10.

Respondent preserved his objections when the evidence was offered by the state in front of the jury. R. 69, l. 2 – R. 70, l 10; R. 150, ll. 19-25; State's Exhibit #33; State's Exhibit #41; R. 203-211.

The Court of Appeals engaged in a straightforward application of this Court's opinion in State v. Brewer, 411 S.C. 401, 768 S.E.2d 656 (2015), in rendering its decision in State v. Washington, 431 S.C. 619, 848 S.E.2d 794 (Ct. App. 2020). In reaching the conclusion that an officer's out-of-court statements were improperly admitted, this Court acknowledged "the propriety of law enforcement interrogation techniques, including misrepresenting the existing and strength of the evidence against an accused, as well as asking the accused to produce evidence voluntarily. Brewer, 411 S.C. at 406, 768 S.E.2d at 658. Additionally, this Court explained that "[s]uch matters are typically examined *in camera* when the trial court is making a

preliminary determination as to the admission of a confession." Id. "But such evidence will rarely be proper for a jury's consideration." Id. at 406, 768 S.E.2d at 659.

During Brewer's interrogation, the "investigators frequently referenced *and quoted* many purported eyewitnesses to Brewer shooting both victims. This evidence was hearsay, offered for the sole purpose of proving the truth of the matter asserted, establishing Brewer's guilt to all charges." Id. at 406-407, 768 S.E.2d at 659 (emphasis in original). This Court implored trial courts and lawyers to exercise "caution" "in the admission of such evidence to ensure that all out-of-court statements are either 'admissible for a valid nonhearsay 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.'" Id. at 407-408, 768 S.E.2d at 659 (quoting State v. Miller, 676 S.E.2d 546, 556 (N.C. 2009)). This Court reminded 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 investigation, but that would otherwise be inadmissible in open court.'" Id. at 408, 768 S.E.2d at 659 (quoting Miller, supra). This Court held the officer's insistence that Brewer prove his innocence during the interrogation video had "*no* place before the jury." Id. (emphasis in original). This Court found it "chilling" to have "to *remind* the state that an accused is presumed innocent and that the state has the burden to prove guilt beyond a reasonable doubt." Id. (emphasis added).

Relying upon this Court's well-reasoned decision in Brewer, the Court of Appeals held the trial judge improperly admitted multiple out-of-court statements by the officer who questioned Respondent at his trial, which occurred two years after this Court issued its opinion in

Brewer. Washington, 431 S.C. at 623, 848 S.E.2d at 796. The Court explained the jury heard the officer "make such comments to [Respondent] as:

> '[C]an you explain why your fingerprints would have been inside the house?'
>
> 'Were you on any kind of drugs or anything in any point of time back in the summer when you would have forgotten doing something? That might explain why you did it.'
>
> 'This is from the state law enforcement division where we send all our fingerprints …. It shows right here two fingerprints were taken. Identified as [Respondent] with that specific state ID number which is assigned to you'
>
> 'I'll call him [Respondent's employer] up but how do you explain your fingerprints inside this man's house? … [T]here's no if, and, or buts about it'
>
> '[B]ut you can't be at work and your fingerprint be inside the house at the same time'
>
> '[T]hen how'd your fingerprint end up there?'
>
> '[Y]ou still have to explain why your fingerprints [are] in that man's house.'
>
> '[W]ell then it still doesn't explain why your fingerprints are there and why you had a stolen gun, and stolen rifle. There was a second gun stolen, it was a pistol, which is why I think you're trying to put the story together of a person you ran into on Bees Ferry in the parking lot of Walmart. You're trying to put some story together to justify why you had access to those'
>
> '[Y]ou also pawned a weed eater … I'm saying you pawned that same day, the same day you pawned that rifle at a different pawn shop which is what people do when they're trying to spread out stuff that's stolen.'

Washington, 431 S.C. at 622, 848 S.E.2d at 796. Thereafter, the Court of Appeals held the officer's questioning during the interrogation was inadmissible hearsay. Id. at 622-623, 848 S.E.2d at 796. Relying upon this Court's decision in Brewer, the Court of Appeals rejected the state's contention that the officer's out-of-court statements were admissible as "context." Id. at 623, 848 S.E.2d at 796.

Again, applying this Court's well-reasoned decision in Brewer, the Court of Appeals held the officer's "repeated requests that [Respondent] explain why he was not guilty amounted to a 'grave constitutional error.'" Id. at 623, 848 S.E.2d at 796 (quoting Brewer, 411 S.C. at 408, 768 S.E.2d at 659). During the interrogation, the officer asserted, among other things, that Respondent's fingerprint was found in the house, that Respondent had stolen the items that he pawned, that the items pawned were in fact stolen, and that Respondent's responses to the officer's interrogation were not satisfactory. Throughout these assertions, the officer repeatedly insisted that Respondent had to explain away the state's evidence. The jury heard the officer shifting the burden of proof to Respondent when the officer required Respondent to explain the evidence and when the officer rejected Respondent's explanations. In the audio recording of Respondent's interrogation, the officer challenged Respondent's denial of guilt by insisting Respondent explain why his fingerprint was found inside the house and why he had pawned certain items. Repeatedly, the officer stated that *Respondent* was *required* to explain how his fingerprint was in the home. The officer's multiple statements shifted the burden of proof to Respondent. The officer was the person who had to prove the case. As a representative of the state, it was the officer's duty to marshal the evidence in the case. Respondent had no burden whatsoever; yet, the officer told him that he did. The officer's improper statement regarding the burden of proof conveyed the improper burden to the jury.

Finally, the majority of the Court of Appeals panel determined the issue was adequately preserved for appellate review. Washington, 431 S.C. at 624, 848 S.E.2d at 797. The majority explained that "[Respondent] preserved the hearsay issue given his specific hearsay objection to the trial court, and his extensive reliance on Brewer in his brief and at oral argument." Id. According to the majority, "[w]hile [Respondent] may not have wrapped his issues up in a neat

categorical box, we do not believe he abandoned the hearsay argument on appeal." Id. The majority noted that the "state did not raise preservation in its brief," and that "[a]lthough the issue was raised by the panel at oral argument the state spent considerable time in its brief and oral argument claiming the recording [was] not hearsay." Id. Thereafter, the majority refused to disturb the state's silence on the issue. Id.

Respondent respectfully requests this Court deny the state's petition for writ of certiorari because the Court of Appeals correctly applied this Court's opinion in Brewer. The Washington opinion represents a straightforward application of this Court's precedent. Respondent's case presents no novel issues as exemplified by the Court of Appeals' opinion and its reliance upon this Court's Brewer decision. There is simply no need for this Court to review the decision issued by the Court of Appeals. Admittedly, one judge dissented from the majority opinion issued by the Court of Appeals. However, the question for the dissenting judge was not whether the trial judge erred; rather, the judge expressed her concern that the hearsay objection had been abandoned on appeal and that trial counsel never objected to the hearsay statements as shifting the burden of proof. In light of the well-reasoned decision by the Court of Appeals, which merely applied this Court's binding precedent, this Court should deny certiorari.

CONCLUSION

Respondent respectfully requests this Court deny the petition for writ of certiorari.

Respectfully Submitted,

s/*Susan B. Hackett*
Susan B. Hackett
Appellate Defender

ATTORNEY FOR RESPONDENT

This 21st day of December, 2020.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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RECEIVED
Dec 21 2020
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CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the return to petition for writ of certiorari in this case has been served on Scott Matthews, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), which is smatthews2@scag.gov; and Mack Seal Washington, #196259, at MacDougall Correctional Institution, 1516 Old Gilliard Road, Ridgeville, SC 29472; and the Court of Appeals, at 1220 Senate Street, Columbia, SC 29201, this 21st day of December, 2020.

s/*Susan B. Hackett*
Susan B. Hackett
Appellate Defender
ATTORNEY FOR RESPONDENT