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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY

Court of General Sessions
The Honorable Edgar W. Dickson, Circuit Court Judge

Appellate Case No. 2019-001611

THE STATE,

Respondent,

v.

DARRIN ANTHONY HOUSER,

Appellant.

AMENDED FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

A defendant's statement to police should be admitted only if it is voluntarily made. Houser requested to speak with police and admitted he understood his rights and was willing to talk with them. Does evidence support the trial court's finding that his statement was voluntary?

STATEMENT OF THE CASE

An Orangeburg County grand jury indicted Appellant Darrin Anthony Houser for murder, attempted armed robbery, first degree burglary, and possession of a weapon during the commission of a violent crime. He proceeded to jury trial on September 9–11, 2019 before the Honorable Edgar W. Dickson. He was acquitted of murder but found guilty as charged of the remaining counts and sentenced to concurrent terms of 20, 20, and 5 years, respectively. This direct appeal follows.

STATEMENT OF FACTS

On the night of August 26, 2015, Appellant Darrin Houser arranged to buy crack cocaine from Anthony Patterson, who lived in a mobile home on Gretta Lane in Orangeburg County. (R.p.147–50). Houser spoke on the telephone with Patterson's friend and neighbor, Michael Dennis, who told Houser to come by the trailer. (R.p.150–52). When Houser arrived, Dennis let him in. (R.p.152).

Dennis testified that when he began to close the door, Houser grabbed his arm. (R.p.152). Two masked men rushed into the home. One held Dennis down while the other went back towards Patterson's bedroom. (R.p.155). Dennis heard gunshots and the men ran away. (R.p.155). Patterson was shot and later died from his injuries. (R.p.156). Dennis testified he saw a white or gray car drive away. (R.p.156).

When police arrived, Dennis identified Houser as the first man who entered the trailer. (R.p.160). He wrote a statement and showed police where Houser lived. (R.p.159). Police were unable to locate Houser, but spoke with his father. (R.p.273). Based on the conversations with Dennis and Houser's father, police obtained arrest warrants for Houser and his nephew, Jeremy Houser. (R.p.274). On August 28, a witness named Kendall Brunson came forward and told police Houser had sold him a 9mm handgun on the night of the robbery. (R.p.343–47). Both .40 caliber and 9mm shell casings were recovered from the scene. (R.p.211–14).

With help from the U.S. Marshals Service, police located Houser in Washington D.C. on August 28. (R.p.274–75). Lt. James Shumpert and Sgt. Leonard Cain with the Orangeburg County Sherriff's Office travelled to D.C. to

interview Houser. (R.p.275). After being advised of his Miranda rights, Houser agreed to speak with the officers. The interview was recorded. (R.p.276). Houser denied any knowledge of a plan to rob Patterson. He admitted he went to Patterson's home to buy crack cocaine, but claimed three unknown men rushed into the home before he could buy the drugs. He claimed one of the men held him down and another held Dennis down while a third man went to the back of the home. (R.p.284). Houser claimed he heard gunshots and the three men ran away. (R.p.284). He denied selling anyone a gun on the night of the robbery, and denied any prior knowledge of a plan to rob Patterson. (R.p.286). Houser claimed the whole incident was a case of "wrong place, wrong time." (R.p.294).

Police transported Houser back to Orangeburg. (R.p.294). On September 3, Lt. Shumpert received a message informing him that Houser was at the county jail and wanted to speak with him. (R.p.295). Shumpert arranged for Houser to be transported to the Sherriff's Office for an interview. (R.p.295). It is this interview that Houser alleges should have been excluded and which requires reversal of his convictions.

The facts bearing on the voluntariness of the statement will be discussed in the argument section, but the substance of Houser's second statement was similar to the first. However, in this statement Houser identified a third male named "little dude" who went with him to the victim's home. (R.p.297–98). In this version of his story, Houser went to the trailer to buy crack, but returned to the car to get his wallet. He claimed he was surprised when "little dude" came running up and went

into the home. (R.p.298–99). He claimed he and his nephew ran inside "to try to stop him" and heard shots. (R.p.299; State's Exhibit No. 5). Houser told the officers the group left together and agreed they needed to get rid of the weapon. (R.p.298). Houser said he traded the gun for drugs. (R.p.298; 457-586). He further claimed he never learned the real name or nickname of "little dude," even after an eight-hour drive together to D.C. (R.p.335). Police never located "little dude." (R.p.338). Houser agreed to give a written statement, and the statement was entered without objection at trial. (R.p.304; 376).

STANDARD OF REVIEW

Factual conclusions as to the voluntariness of a statement will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion. When reviewing a trial judge's ruling concerning the voluntariness of a statement, the appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial judge's ruling is supported by any evidence. State v. Arrowood, 375 S.C. 359, 366, 652 S.E.2d 438, 442 (Ct. App. 2007).

ARGUMENT

Houser's argument that the trial court erred by admitting his statement to police is not preserved for review because he did not object when the statement was entered at trial. Even if preserved, evidence supports the trial court's finding that Houser's statement was voluntary.

Houser's argument that the trial court erred by admitting his September 3 statement to police is not preserved for review because he did not object when the statement was entered at trial. Even if preserved, Houser's argument fails because evidence supports the trial court's finding that Houser's statement to police was voluntary. Specifically, Houser admitted in his pretrial testimony that he understood his right to remain silent and "was willing to talk to [police]." This Court should affirm.

A. Issue Preservation.

Houser's argument that the trial court erred by admitting his September 3 statement to police is not preserved for review because he did not object when the statement was entered at trial.[1] On the day before trial, on the initiative of the prosecutor, the trial court convened a hearing to determine the voluntariness of Houser's statements pursuant to Jackson v. Denno, 378 U.S. 368 (1964). The court heard testimony from both officers involved in taking Houser's statements, and Houser testified as well. At the conclusion of the testimony, the trial court ruled: "I

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[1] Houser's brief alleges error in the admission the September 3 statement, but not his August 28 statement. Accordingly, even if this Court finds Houser has preserved his argument regarding the September 3 statement, this is the only argument the Court should consider. State v. Bray, 342 S.C. 23, 535 S.E.2d 636, 639 n.2 (2000) (explaining a reviewing court should not consider an issue that is not presented on appeal).

think it's pretty clear. I think he's made a voluntary statement." (R.p.82). Defense counsel responded by saying only: "Thank you, your honor." (R.p.82).

Trial began the next day. After opening statements, the court addressed a separate legal motion concerning the propriety of the weapons charge. The court asked defense counsel whether he had "[a]nything to add," and counsel responded that he did not. (R.p.35, line 14). Houser also failed to raise the issue at a later opportunity when the court was discussing the admissibility for impeachment purposes of Houser's prior convictions. (R.p.236–38). The State called seven witnesses before finally offering the testimony of Lt. Shumpert, the officer who interviewed Houser. Rather than play the entire video recordings of the interviews, the State used a transcript to refresh Shumpert's memory about Houser's specific statements. At no point did Houser object to the admission of his oral statements into evidence. (R.p.275–304). In fact, defense counsel even requested that the recordings be marked as Court's Exhibits Nos. 2 and 3. (R.p.239–40). Nor did Houser object when his written statement was offered into evidence. (R.p.370, 376). Houser specifically stated he had no objection to the introduction of the written statement and advisement of rights forms Houser signed before the interview. (R.p.376). Finally, on cross-examination, defense counsel elicited parts of Houser's statements from Lt. Shumpert. (R.p.326–27, 332–35).

"In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal." State v. Dunbar, 356 S.C. 138, 142,

587 S.E.2d 691, 693-94 (2003). An in limine ruling is not final and a contemporaneous objection is required to preserve an issue for appeal. State v. Wannamaker, 346 S.C. 495, 499, 552 S.S.2d 284, 286 (2001). A pre-trial ruling on the admissibility of evidence is preliminary, and is subject to change based on developments at trial. Id. Unless an objection is made at the time the evidence is offered and a final ruling made, the issue is not preserved for review. State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993). The failure to object when evidence is offered constitutes a waiver of the right to raise the issue on appeal. State v. Simpson, 325 S.C. 37, 42, 479 S.E.2d 57, 60 (1996).

A full day and the testimony of seven witnesses separated the court's pretrial ruling from the introduction of the statements. Accordingly, this case does not fall within the exception to the preservation rule where testimony is presented "immediately" after a trial court's ruling on its admissibility. See State v. Tufts, 355 S.C. 493, 497, 585 S.E.2d 523, 525 (Ct. App. 2003). Given Houser's straightforward admission that he was "willing to talk" to the officers, understood his rights, and understood that his statement would be used against him, and the trial court's ruling that Houser's statement was "clearly" voluntary, defense counsel could have simply concluded the motion was meritless and not worth making. (R.p.67).

Alternatively, given the non-inculpatory nature of the statement, defense counsel may have concluded it helped Houser's case to admit his statement. Indeed, because Houser did not testify, the admission of his statement allowed him to put his version of events before the jury without having to take the stand. In either

case, this is not a case where the Court should disregard error preservation requirements and infer Houser's objection.

Because Houser did not object to the admission of his statements when offered into evidence at trial, his argument on appeal is not preserved for review. This Court should reject Houser's invitation to discard its well-established error preservation rules. This Court should affirm.

B. Evidence supports the trial court's finding that Houser's statement was voluntary.

Even if preserved, Houser's argument is meritless. Houser claims "Officer Shumpert used a combination of threats and promises of leniency to improperly induce Appellant to make a statement about the incident . . . ." Brief of Appellant at 6–7. Specifically, Houser claims Lt. Shumpert "showed Appellant a photo of Shumpert's dead daughter and promised Appellant on his daughter that he would help Appellant with his charges and sentencing if he gave a statement." Brief of Appellant at 6. Lt. Shumpert did no such thing, as the recording of the September 3 interview shows. Furthermore, Houser confuses the facts, mixing allegations and facts related to the September 3 statement and a third alleged statement officers testified never happened. His argument depends on this Court overturning the trial court's factual findings resolving this conflicting testimony and the credibility of the witnesses, in violation of the applicable abuse of discretion standard. It should be rejected. Most importantly, the record strongly supports the trial court's ruling that Houser's statement was made voluntarily. Under the abuse of discretion standard, this Court needn't go any further. This Court should affirm.

The test for determining the admissibility of a statement is whether it was knowingly, intelligently, and voluntarily given under the totality of the circumstances. State v. Peake, 291 S.C. 138, 139, 352 S.E.2d 487, 488 (1987). The State may not introduce a statement that was "induced by force, psychological or physical, or by direct or implied threats." State v. Rochester, 301 S.C. 196, 201, 391 S.E.2d 244, 247 (1990). Likewise, a statement may not be "induced by a promise of leniency." State v. Arrowood, 375 S.C. 359, 369, 652 S.E.2d 438, 443 (Ct. App. 2007). The pertinent inquiry is whether the defendant's will was "overborne." Id.

The video-recorded interview itself (which, remarkably, Houser did not designate for this Court's review) provides the best evidence of voluntariness. Not only does the recording show exactly what was said, it shows the demeanor of both Houser and Lt. Shumpert. It strongly supports the trial court's ruling.

The interview began with police advising Houser of his constitutional rights orally and in writing. Houser initialed a form next to the "advisement of rights" section, but, as in his first interview, refused to sign the "waiver of rights." (R.p.296; Court's Exhibit No. 2). Houser apparently thought that by signing the form he would permanently waive all of his constitutional rights, because he exclaimed he would "never" sign anything that waived his rights. (Court's Exhibit No. 2 around 0:30). Lt. Shumpert understood his confusion and tried to explain that he wasn't "waiving his rights forever," but Houser refused to sign the paper. Regardless, Houser acknowledged he understood his rights, that "no promises,

threats, or coercion have been used," and that no one was "twisting his arm" to make him talk. (Court's Exhibit No. 2 around 0:45).

After the advisement of rights, Houser began to tell the same version of events he told Lt. Shumpert in D.C., insisting he was telling the truth. Lt. Shumpert again indicated he did not believe him and started to terminate the interview, remarking to Stokes that Houser "[didn't have] anything to say." (Court's Exhibit No. 2 around 4:00). They left the room to take Houser back to jail, but Houser requested to continue talking and returned to the interview room. (R.p.296; Court's Exhibit No. 2 around 4:30). Lt. Shumpert testified that "[h]e had the opportunity to go back to jail, but he decided that he wanted to talk so he came back." (R.p.326).

Before resuming the interview, Lt. Shumpert decided to further explain to Houser that he did not have to speak with them, and went over the advisement of rights form again. Shumpert ensured Houser that no coercion would be used, and told him: "If you feel like you want to stop talking, you can stop anytime you feel like it." (Court's Exhibit No. 2 around 5:40). Houser asked whether the interview was being recorded, and Lt. Shumpert responded: "it is." (Court's Exhibit No. 2 around 6:00). Houser then paused for a moment and began telling officers what happened. Lt. Shumpert testified Houser appeared to understand everything that was happening. (R.p.296).

One event is conspicuously absent from the video: Lt. Shumpert's promise "'on his dead daughter' that he would help Appellant get a more lenient sentence if

Appellant gave a statement." Brief of Appellant at 10. In fact, Shumpert made no such promise at any point during the interview.

In his brief, Houser cites to page 73 of his pretrial testimony to support this claim. When asked about any promises made during the September 3 interview, Houser claimed Lt. Shumpert "reiterated about his daughter" and that he would "help him out." Houser omits a crucial facet of his testimony; on page 69 of the pretrial transcript, he claimed Shumpert made this purported promise **at a completely separate interview**, one that Shumpert testified never happened and that the State did not seek to admit at trial. Houser alleged Lt. Shumpert made the promise at the police station on August 2, "when [he] got back from D.C.," before he ever went to the Orangeburg jail. (R.p.69). He claimed Shumpert "went into his office and got a picture of his daughter and said, my daughter is deceased and I swear on my daughter that I will help you out." (R.p.69). Houser claimed he met with officers four times, instead of the two times testified to by Shumpert.

Houser's assertions that he met with officers four times instead of two, and that Lt. Shumpert made promises of leniency, directly conflict with Shumpert's testimony. Shumpert testified he met with Houser twice, and never made any promises of leniency. The State never sought to introduce any purported third statement. This direct conflict in testimony raised a question of witness credibility. Such questions are within the province of the trial court. "[T]he abuse of discretion standard of review does not allow [the appellate] court to reweigh the evidence or second-guess the trial court's assessment of witness credibility." State v. Douglas,

411 S.C. 307, 316, 768 S.E.2d 232, 238 (Ct. App. 2014). This is so because the circuit court is in a better position to assess the credibility of witnesses. Lollis v. Dutton, 421 S.C. 467, 478, 807 S.E.2d 723, 728 (Ct. App. 2017). Where "the evidence conflicts as to whether a defendant's statement is voluntary, it is, in the first instance, the province of the trial court to determine this factual issue by the preponderance of the evidence." State v. Arrowood, 375 S.C. 359, 367, 652 S.E.2d 438, 442 (Ct. App. 2007).

In addition to being flatly denied by Shumpert at trial, Houser's assertions are highly suspect on their face. Lt. Shumpert is an experienced and skilled investigator. The recordings of the interviews show Shumpert knew how to conduct a proper interview without making promises of leniency. Shumpert testified that "sometimes the Court will give leniency to you. I can't give you leniency. I can't make [a] decision whether how much time you get or not. Never told him that." (R.p.334). This conflict in testimony was resolved by the trial court, and the record supports a finding that Houser's testimony was not credible, and that Shumpert never made the purported promise to "help him out."

Also absent from the recording of the interview is any threat against Houser, as Houser claims on page 9 of his brief. To support this claim, Houser cites page 38 of the pretrial transcript. In this portion of the transcript, defense counsel cross-examines Lt. Shumpert about what occurred during the interview. Defense counsel asked whether Shumpert "told Darrin Houser if that was all he had for you at the very beginning he could spend his life in jail and you didn't have anything else you

needed to talk to him. . . ." (R.p.38, lines 14–18). Shumpert responded that he "probably did say that." (R.p.38, line 22). Shumpert did not say this during the interview, as the recording shows. However, Shumpert admitted he made the comment as he was walking out of the interview room after terminating the interview. He described it as a comment that it would be "stupid" for Houser to spend his life in jail. (R.p.39, lines 3–6).

Houser analogizes this comment to egregious, explicit official threats, such as a threat to imprison a suspect's spouse, as in State v. Corns, 310 S.C. 546, 426 S.E.2d 324 (Ct.App.1992), or to prosecute the suspect for withholding evidence, as in State v. Osborne, 301 S.C. 363, 392 S.E.2d 178 (1990). But these cases are wildly different from this one. Shumpert did not threaten that police would to bring additional charges or seek more severe punishment against Houser or anyone else, or to take any other action. Shumpert's comment was not a threat; it was merely the officer's opinion that Houser was stupidly exposing himself to a lengthy prison sentence by relying on an unbelievable story at trial. The comment is similar to the one in State v. Rochester, 301 S.C. 196, 391 S.E.2d 244 (1990), where the Supreme Court found no error when a suspect was told it would be in his "best interest to tell the truth." Rochester, 301 S.C. at 199, 391 S.E.2d at 246. This isolated comment is a far cry from the type of coercive pressure forbidden by the Fourteenth Amendment. Cf. Arizona v. Fulminante, 499 U.S. 279, 286 (1991) (affirming trial court's finding on involuntariness where officer "offered to protect Fulminante [from

threatening, violent fellow inmates] in exchange for a confession" in face of "belief that the defendant's life was in jeopardy if he did not confess").

If the video isn't clear enough, Houser's pretrial testimony clears up any confusion. Houser explicitly admitted under oath that he understood "exactly" what his rights were when giving his statement, including the right to remain silent. (R.p.78, lines 21–23). He testified repeatedly that he "was willing to talk" to police. (R.p.76, lines 5–6). Houser even told Lt. Shumpert to ask "anything you want." (R.p.77). Houser demonstrated a calm and willing demeanor throughout the interview, and appeared to have a good rapport with investigators. (Court's Exhibit No. 2 around 34:30). These were not "circumstances calculated to break the strongest nerves and the stoutest resistance." Chambers v. State of Florida, 309 U.S. 227, 238-39 (1940).

The record as a whole strongly supports the trial court's finding that Houser's statement was voluntary. Houser requested to speak to police and reiterated during his pretrial testimony that he was willing to give a statement. This Court should affirm.

C. Harmless error.

Even if the interview was erroneously admitted, Houser was not prejudiced. Michael Dennis's testimony identifying Houser as the first man to enter the home was exceedingly reliable because the two men were well-acquainted. Houser admitted he was present for the robbery during his first interview, the admission of which is not challenged on appeal. Furthermore, his statement was far from a

confession; it was not even inculpatory. While he changed his story to admit that it was his nephew and "little dude" who followed him into the home, he denied any knowledge of a plan to rob Patterson. The statement did little to change the case against Houser, and did not change the result of trial. See Arizona v. Fulminante, 499 U.S. 279, 303 (1991) (holding "admission of an 'involuntary' confession at trial is subject to harmless error analysis"); Id. at 313 (Kennedy, J., concurring) (explaining courts "must appreciate the indelible impact a full confession may have on the trier of fact, as distinguished, for instance, from the impact of an isolated statement that incriminates the defendant only when connected with other evidence"). Finally, the statement was mostly cumulative to his unchallenged August 28 statement, and the differences between the first and second statement are not inculpatory. Any error was harmless. This Court should affirm.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent 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."

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