

12-12956-DD

UNITED STATES COURT OF APPEALS

ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee.

-vs-

KENDRICK LOWE,
Appellant,

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

REPLY BRIEF OF APPELLANT

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ARGUMENTS AND CITATIONS OF AUTHORITY

I. LOWE’S STATEMENTS WERE INVOLUNTARY

The government cites one case in its’ initial brief in support of its’ argument that the detectives’ statements were not coercive and would not invalidate Lowe’s waiver. See Appellee’s Brief page 36, *United States v. Thompson*, 422 F. 3d 1285, 1297 (11th Cir. 2005). The facts in *Thompson* are clearly distinguishable from the instant case. The issue in *Thompson* was the allegations by the defendant that the agents allegedly withheld her pain medication until she made a statement. There, the magistrate made a credibility determination that the agents did not induce the defendant to make a statement by withholding her pain medication citing the fact that the only testimony offered by defendant was “vague testimony that the officers’ behavior - -, namely, their alleged “rude gestures” and laughter in response to her request for medicine - - implied a quid pro quo arrangement. Here, there are no need for credibility determinations as the conversation is recorded on audio. Furthermore, there is no effort by the detectives in *Thompson* to lie about the consequences of a confession as is the case here. It is indisputable that the detectives’ clearly lie to Lowe-not about other evidence-but about the consequences of confessing. This is a blatant attempt by the detectives’ to eviscerate the *Miranda* warnings that they just finished reading Lowe. It is no

coincidence that after detectives' made their coercive statements Lowe admitted to being at the location of the robbery.

II. THERE WAS NO PROBABLE CAUSE TO ARREST LOWE

In support of its' argument that there was probable cause to arrest Lowe, the government mentions that prior to the Wendy's robbery Bynum had stated that Davis led an active robbery crew and identified Lowe's photograph. See Appellee's Brief pg. 37. This statement-while it may or may not be true¹-is misleading. Bynum could not identify that individual as actually being involved in any robberies. Also, the operative fact in this analysis is that no one in law enforcement linked that photograph to Lowe *prior* to his arrest, therefore it clearly did not factor in the officer's probable cause to arrest Lowe. The government asserts that Lowe also matched the description of the Wendy's robbers. Contrary to the government's assertion Lowe did not match a description of any of the Wendy's robbers as he was wearing a white t-shirt and gray pants at the time of his arrest. There was simply no probable cause to arrest Lowe for this robbery.

The government next suggests that any error in the denial of the suppression motions is harmless given the substantial evidence of Lowe's guilt and cites

¹We will never know if this is accurate as the photo was not in the possession of law enforcement and was not provided to the defense in discovery.

United States v. Burgest, 519 F. 3d 1307, 1309. (11th Cir. 2008). That Court did hold that even if Burgest's confession was admitted in error, any error was harmless. *Burgest*, 519 F. 3d at 1309, 1310. However, the other evidence against Burgest amounted to Burgest being in actual possession of a pill bottle containing a large amount of crack cocaine, \$285 cash, a video of Burgest selling crack to the confidential informant and the confidential informant testifying that he purchased the crack cocaine. *Burgest*, 519 F. 3d at 1309. One cannot fathom how that case is analogous to Lowe's case especially in light of the false-exculpatory statement jury instruction.

III. LOWE'S CVS-KENDALL CONVICTIONS WERE NOT SUPPORTED BY SUFFICIENT EVIDENCE

Lowe maintains that the evidence was insufficient to support any of his convictions, but would note that the government failed to respond to the specific CVS-Kendall Hobbs Act Robbery and the accompanying 924© convictions.² This is because there is no evidence to support those two convictions.

IV. THE DISTRICT COURT REVERSIBLY ERRED IN ADMITTING VILLAVERDE'S IDENTIFICATION TESTIMONY

The circumstances surrounding the admission of Villaverde's identification

²In its' initial brief the government specifically mentions the evidence that support each of the other three robberies. See Appellee's Initial Brief page 45, 46.

of the members of the robbery crew and their modus operandi is distinguishable from the defendants in *United States v. Jiminez*, 564 F. 3d 1280 (11th Cir. 2009) *United States v. Johnson*, 741 F. 2d 1338 (11th Cir. 1984). In *Jiminez*, the statements were only admitted on re-direct examination for the purpose explaining why the co-defendant was re-interviewed after the Detective was extensively cross-examined on this issue. *Jiminez*, 741 F. 2d at 1286, 1287. That is not the case here as there can be no argument that the defense “opened the door” on this issue. In *Johnson*, the Court did not discuss the admissibility of a note describing the vehicle used in the robbery instead mentioning its’ contents in dicta in a footnote. *Johnson*, 741 F. 2d at 1340 n. 2. Notably, in that footnote the Court mentions that the note did not identify any individuals involved in the robbery, unlike the situation here. The government’s argument that they did not mention the charged robberies-just robberies in general- is simply not true³ and is immaterial.

CONCLUSION

In conclusion, the Court should vacate the judgment and sentence and remand to the District Court with instructions to either grant a new trial or enter judgments of acquittal.

³The government overlooks the fact that Lowe was charged in a conspiracy count.

CERTIFICATE OF COMPLIANCE WITH TYPE STYLE AND VOLUME

I HEREBY CERTIFY that the brief complies with the type-volume limitation and contains 1195 words.

s/Gennaro Cariglio Jr.
Gennaro Cariglio Jr.

CERTIFICATE OF COMPLIANCE WITH ELECTRONIC FILING

I HEREBY CERTIFY that the brief has been, or shortly will be, provided to the Court in electronic format as described in 11th Cir. R. 31-5.

s/ Gennaro Cariglio Jr.
Gennaro Cariglio Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed using the CM/ECF system on April 23rd, 2013.

Respectfully submitted,

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