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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Debra R. McCaslin, Circuit Court Judge

THE STATE, RESPONDENT,

V.

TRA'VION MARQUIS HAMPTON, APPELLANT

APPELLATE CASE NO. 2021-001508

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in permitting Chief Hayes's testimony that the complainants told Hayes they knew the identity of the robber, where Hayes's testimony was based exclusively on what the complainants told him and was offered for the truth of the matter asserted, since "investigative information" may not be used to circumvent the hearsay rules?

STATEMENT OF THE CASE

On December 2, 2019, a Lexington County Grand Jury indicted Appellant for armed robbery and possession of a weapon during the commission of a violent crime. R. 364 – 367. Appellant was tried before the Honorable Debra McCaslin and a jury, from December 7 – 9, 2021. Appellant was represented by Jason Chehoski and Vanessa Horsley. Angela Martin and Kelly Oppenheimer prosecuted the case. R. 1. Appellant was convicted as indicted, and he was sentenced to serve concurrent terms of imprisonment of eighteen years for armed robbery and five years for possession of a weapon during the commission of a violent crime. R. 361, ll. 3-9; R. 368 – 371.

This brief of appellant follows.

STANDARD OF REVIEW

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Hatcher*, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (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.*; *see also State v. Brockmeyer*, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

ARGUMENT

The trial court erred in permitting Chief Hayes's testimony that the complainants told Hayes they knew the identity of the robber, where Hayes's testimony was based exclusively on what the complainants told him and was offered for the truth of the matter asserted, since "investigative information" may not be used to circumvent the hearsay rules.

Relevant facts

On August 23, 2019, the Tiger Stop convenience store in Swansea was robbed by a by a slim black man who carried a pistol. The robber did not wear a mask and he appeared to be in his early twenties. He wore a Zaxby's baseball cap, a camouflage shirt, dark pants, and Nike Air Jordan tennis shoes. Sumet Patel and Theodora Woodman (the complainants) were working behind the counter when the robber vaulted over the counter and demanded money at gunpoint. After Patel opened the register and gave the robber four or five hundred dollars in cash, the robber quickly left the store. Patel pressed a panic button and police responded. R. 116, l. 25 – 132, l. 9; R. 244, l. 6 – 247, l. 6; R. 165, l. 21 – 166, l. 8; State's Exhibit #19. Store security cameras captured the robbery, which was over in about thirty seconds. *See* State's Exhibit #19.[1]

Patel and Woodman would both claim at trial that they recognized the robber as a regular customer, and they told police so. Neither Patel nor Woodman knew the man's name. R. 129, l. 17 – 130, l. 17; R. 247, l. 7 – 249, l. 6. The prosecution sought to bolster their testimony by eliciting that they had told Chief Hayes they recognized the robber early on in the investigation. The testimony was elicited from Chief Hayes as follows.

> Q. At the time when you first met with them that afternoon, were you given a potential name of a suspect?

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[1] State's Exhibit #19 is the video surveillance footage of the robbery and is on file with this Court.

A. When I first arrived on the scene, [Patel] initially told me that he was very familiar with the individual that came in and committed the crime—

MR. CHEHOSKI: Your Honor, I'd have to object. It's hearsay.

MS. MARTIN: Your Honor, it's the course of the investigation, how he learned and where they went from there.

THE COURT: I'm going to allow it. Go ahead.

THE WITNESS: He told me at the time that he was very familiar with the individual that actually came in and did the armed robbery, but he wasn't aware of the name at that point. That was on the 23rd.

Q. Okay. And can you tell us whether or not [Woodman] indicated she knew the armed robber?

A. She did. She said that she was very familiar with the individual, he comes in very frequently. And at the time, they were unable to provide a name.

R. 167, l. 11 – 168, l. 10.

After police had left, Patel showed a still photograph from the security footage to another regular customer, Rocky Edmond. Edmond claimed to recognize the robber as a man with the last name Hampton. R. 234, l. 23 – 237, l. 1; R. 140, l. 20 – 141, l. 9. Patel searched Facebook for Hamptons until he turned up a photograph of Appellant. Patel gave Appellant's name to police. Police officers showed Patel a photographic lineup that contained Appellant's picture the next day. Patel identified Appellant as the robber by selecting his picture from the lineup. R. 141, l. 16 – 1146, l. 22; R. 222, l. 15 – 225, l. 18; R. 363.

Patel and Woodman claimed Appellant was a regular customer at the Tiger Stop who came in several times a day to buy cigars and beverages, and who used to come in for chicken. R. 129, l. 17 – 132, l. 17; R. 247, l. 7 – 251, l. 22. Both Patel and Woodman identified Appellant as the robber. R. 254, l. 5 – 255, l. 8; R. 146, ll. 8-25. However, a palm print recovered by police from the counter was found <u>not</u> to match Appellant. R. 174, l. 17 – 175, l. 8. A search of

Appellant's home did not turn up the pistol, the cash, or any other incriminating evidence except that police did recover a pair of black Nike Air Jordan tennis shoes. R. 172, ll. 5-23; R. 198, ll. 7-19. The suspect's face was blurry on the video surveillance footage. *See* State's Exhibit #19.

Discussion

Investigative information may not be employed to circumvent the hearsay rules. In *State v. King*, 422 S.C. 47, 52, 810 S.E.2d 18, 20-21 (2017), the prosecution elicited over objection that Officer Butler talked to neighbors who said they heard multiple gunshots. On appeal, the State argued Officer Butler's testimony was not inadmissible hearsay since she merely relayed what she learned during her investigation. *Id.*, 422 S.C. at 64-65, 810 S.E.2d at 27. The Supreme Court found the admission of the testimony, which should be analyzed under traditional hearsay rules, was error. "We find the disposition of this issue involves a straightforward hearsay analysis." *Id.*, 422 S.C. at 66, 810 S.E.2d at 28. "Officer Butler's testimony was hearsay as it was based exclusively on what the witnesses told her during the neighborhood canvas and was offered to prove that King fired more than one gunshot. Further, we do not discern, nor has the State cited, any exception to the hearsay rule that would provide for the admissibility of the testimony." *Id.*

"Nonetheless, even with this straightforward analysis, we believe it is necessary to caution prosecutors against using 'investigative information' as it appears this is an attempt to circumvent the rules against hearsay." *Id.*, 422 S.C. at 66-67, 810 S.E.2d at 28. "[W]e caution against the use and admission of 'investigative information.' While it may be couched in terms of explaining an officer's conduct during an investigation, it may not be used to offer the substance of an out-of-court statement that would otherwise violate our state's rules against hearsay." *Id.*, 422 S.C. at 68, 810 S.E.2d at 29.

"'Hearsay' is 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. "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute." Rule 802, SCRE.

Although the prosecutor claimed that Chief Hayes's testimony about what the complainants said was not hearsay because it was learned "in the course of the investigation," the proper analysis of that testimony is to consider its admissibility under the traditional hearsay rules. The testimony was not admissible under the traditional hearsay rules since Hayes was not the declarant and his remarks relayed information he obtained solely from the complainants. The testimony was offered to prove the truth of the matter asserted—that the complainants recognized the robber as a regular customer, Appellant. The State offered no other justification for how this testimony was not hearsay, it only claimed the information was learned during the course of the investigation. In particular, the State did not present the testimony as an excited utterance pursuant to Rule 803(2), SCRE—it did not establish how long after the incident Chief Hayes spoke with the complainants or otherwise show they were still under the stress of the event.

The admission of this evidence was error.[2] The error was not harmless. The ultimate issue in this case was the credibility of the complainants as to identity of the robber. The complainants' testimony that they recognized the robber as a regular customer, and that the customer was Appellant, was the State's strongest evidence against Appellant. Chief Hayes's

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2 Appellant recognizes that defense counsel did not object to the cumulative testimony of another witness, Chief Rebolj, that Patel claimed he recognized the robber as a regular customer, and that this Court may conclude the matter is more properly raised in post-conviction relief (PCR). However, Appellant respectfully asserts that fundamental fairness weighs in favor of this Court granting him a new trial on these facts.

testimony corroborated the complainants' claim they recognized the robber, and thereby improperly bolstered their claims. *See generally State v. Jennings*, 394 S.C. 473, 479, 716 S.E.2d 91, 94 (2011) (because the witness's credibility was the ultimate determination for the jury to make in deciding appellant's guilt, the trial court's error in admitting improper corroboration testimony was not harmless). Eyewitness testimony is notoriously unreliable. *See United States v. Wade*, 388 U.S. 218, 228 (1967) ("The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification . . . The identification of strangers is proverbially untrustworthy.") The video surveillance footage was blurry and did not establish the robber's identity. The palm print on the counter did not match Appellant. Although Appellant owned a pair of Nike Air Jordan tennis shoes, the shoes were mass-produced and were not unique.

"Investigative information" may not be used to circumvent the hearsay rules. *King*, 422 S.C. at 68, 810 S.E.2d at 29. Chief Hayes's testimony on this matter should have been excluded pursuant to Rule 802, SCRE. This Court should reverse.

CONCLUSION

Based on the foregoing argument, Appellant respectfully asks this Court to reverse his convictions and sentences and remand for a new trial.

Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 27th day of July, 2022.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Tra'Vion Marquis Hampton states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge Debra R. Mccaslin, which was held on December 7 - 9, 2021, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

Wherefore, she asks the Court to relieve her as counsel for Tra'Vion Marquis Hampton.

Respectfully Submitted,

Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 27th day of July, 2022.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant 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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CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Anders Brief of Appellant and Designation of Matter in the above-referenced case has been served upon William M. Blitch, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Tra'Vion Marquis Hampton, #386707, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 27th day of July, 2022.

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