STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County

Honorable DeAndrea G. Benjamin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT LEE CARTER, JR.

APPELLANT

APPELLATE CASE NO. 2022-000396

ANDERS BRIEF OF APPELLANT

JOANNA K. DELANY
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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in admitting body-worn camera footage of the complainant and police officers talking about the facts of the crime, where the complainant passed away from unrelated causes prior to trial, since the admission of the footage violated Appellant's right to confrontation, and it was inadmissible hearsay?

STATEMENT OF THE CASE

On September 26, 2019, a Florence County Grand Jury indicted Robert Carter, Jr., Appellant, for attempted murder, armed robbery, and criminal conspiracy. R. 297 – 298. Appellant was tried before the Honorable DeAndrea G. Benjamin and a jury, from March 14 – 16, 2022. Appellant was represented by Scott Floyd and Elizabeth Neyle. Jamie Scruggs and Danielle Lefridge prosecuted the case. R. 1.

Appellant was convicted of the lesser-included offense of assault and battery of a high and aggravated nature (ABHAN), and he was also convicted of armed robbery and criminal conspiracy. R. 282, ll. 7-19. The court sentenced Appellant to serve concurrent terms of imprisonment of 16 years for ABHAN, 16 years for armed robbery, and 5 years for criminal conspiracy. R. 289, ll. 17-21; R. 291 – 296.

This appeal 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 admitting body-worn camera footage of the complainant and police officers talking about the facts of the crime, where the complainant passed away from unrelated causes prior to trial, since the admission of the footage violated Appellant's right to confrontation, and it was inadmissible hearsay.

Relevant facts

On May 21, 2019, a woman eating at Golden Corral in Florence walked outside and saw two Latino men beating a third man. The woman called 911. Officer Sullivan was dispatched to a fight in progress at 7:58 p.m. and she arrived at 8:01 p.m. to find Thomas McElveen, Complainant, across the parking lot from Golden Corral near the Toys "R" Us. Complainant had a swollen and bloody face. He lifted his shirt and showed Officer Sullivan several shallow stab wounds in his left torso.[1]

Complainant told Officer Sullivan that two men approached him, kicked his bicycle away, beat him, stabbed him, and took around $60 in cash from his pocket. Complainant described the men as a Native American man in a red shirt and a white man with rainbow-tinted sunglasses. Complainant thought one of the men was called Billy and Complainant believed he may have stabbed one of the men back. Complainant identified the direction the men ran away towards, and he was taken to the hospital.[2]

Other officers quickly began searching the area for the suspects but did not find them. Offices expanded their search area by a mile or two and stopped Appellant Robert Carter, who

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[1] R. 84, l. 4 – 86, l. 7; R. 91, l. 17 – 93, l. 8; State's Exhibit #1.

[2] R. 93, l. 12 – 99, l. 15; State's Exhibit #1.

was wearing a red shirt, and his brother Leonard Carter, who was wearing a blue shirt, walking down Second Loop Road headed east. Petitioner and his brother were white men with sunburned skin and Petitioner had rainbow-lensed sunglasses. Petitioner had a pocketknife, a wad of cash, and a receipt from Golden Corral for a meal purchased at 7:04 p.m. that day. Neither Petitioner nor his brother had any injuries, and neither was named Billy.[3]

An expert in DNA analysis testified that a swab from Appellant's pocketknife contained a mixture of the DNA of two individuals. The expert opined that her analysis "provides very strong support for the possible explanation that . . . Robert Carter, Jr. and Thomas McElveen contributed to the mixture . . ." An analysis of a swab from Appellant's brother Leonard's hands provided "very strong support that I would see this DNA mixture if Thomas McElveen and an unidentified unrelated individual contributed to the mixture . . ."[4]

Because Complainant died prior to Appellant's trial, Complainant did not testify. Pretrial, Appellant moved to exclude Officer Sullivan's body-worn camera footage, which contained questions and answers about what happened between Officer Sullivan and Complainant. During much of the footage, Officer Sullivan can be seen taking notes on a notepad. Appellant objected to the admission of the footage as violating his Confrontation Clause rights and as hearsay. The court took testimony *in camera* from Officer Sullivan. The court admitted the redacted footage, ruling the statements were nontestimonial since they were made to enable police officers to meet an ongoing emergency, and ruling the statements qualified under the excited utterance exception

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[3] R. 101, l. 1 – 108, l. 13; R. 112, l. 18 – 115, l. 9; R. 132, ll. 2-14; R. 155, ll. 4-14.

[4] R. 193, l. 10 – 195, l. 20.

to the hearsay rules. The body-worn camera footage was admitted as State's Exhibit #1 and is on file with this Court.[5]

No one identified Appellant as one of the attackers at trial, and the amount of cash Appellant had was not the same as the amount of cash stolen from Complainant. The jury deliberated for 2 1/2 half hours before convicting Appellant of ABHAN, armed robbery, and criminal conspiracy. As seen, he was sentenced to 16 years.[6]

Discussion

The trial court erred in admitting the body-camera footage since it violated Appellant's right to confront his accuser and since it was inadmissible hearsay.

The footage contained a description of events and suspects as stated by Complainant. The admission of the footage violated the Confrontation Clause. The Sixth Amendment guarantees an accused the right to be confronted with the witnesses against him. This protection applies in state courts by virtue of the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 406 (1965). The Confrontation Clause prohibits the admission of testimonial, out-of-court statements unless the witness is unavailable at trial and the defendant had a prior opportunity to cross-examine the witness. *Crawford v. Washington*, 541 U.S. 36, 68 (2004). Nontestimonial evidence is exempted from Confrontation Clause scrutiny. *Id.*

Where the primary purpose of an out-of-court statement is to serve as evidence or an out-of-court substitute for trial testimony, the statement is considered testimonial. *Bullcoming v. New Mexico*, 564 U.S. 647, 671-72 (2011) (Sotomayor, J., concurring). However, where no such primary purpose exists, admissibility is governed by the evidence rules, not the Confrontation

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[5] R. 94, ll. 11-14; R. 49, l. 23 – 71, l. 5; State's Exhibit #1.

[6] R. 124, ll. 18-23; R. 150, ll. 15-20; R. 277, l. 6; R. 281, l. 15 – 282, l. 19; R. 289, ll. 17-21.

Clause. *Michigan v. Bryant*, 562 U.S. 344, 358-59 (2011); *see also State v. Brockmeyer*, 406 S.C. 324, 352, 751 S.E.2d 645, 660 (2013). The officer's body-worn camera footage was testimonial—Officer Sullivan can be seen taking notes during the conversation with Complainant, so the questions and answers between the officer and Complainant contained on the footage were for the primary purpose of serving as evidence. Complainant was unavailable at trial and Appellant did not have an opportunity to cross-examine him. The admission of the footage therefore violated the Confrontation Clause. U.S. Const. amend. VI; *Brockmeyer*, 406 S.C. at 342, 751 S.E.2d at 654-55.

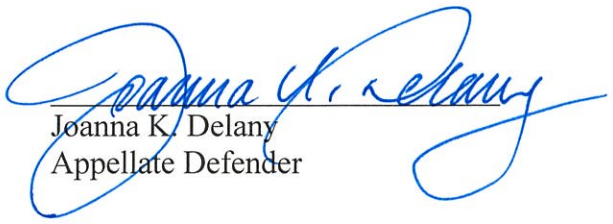
The footage was also hearsay. "'Hearsay'" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute." Rule 802, SCRE. "The following are not excluded by the hearsay rule, even though the declarant is available as a witness . . . Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Rule 803(2), SCRE.

The statements were made by the declarant, Complainant, outside the trial and were offered for proof of the matter asserted. The footage did not qualify under the excited utterance exception since the attack had already concluded by the time Officer Sullivan arrived. Complainant was no longer under the stress of the attack by the time filming began, he had already been informed that EMS was on the way. The footage was inadmissible. Rule 802, SCRE.

This footage was the only time the jury was allowed to hear directly from Complainant since he passed away prior to trial. Absent the admission of the footage, Appellant would likely have been found not guilty. The error was not harmless, and this Court should reverse. U.S. Const. amend. VI; *Brockmeyer*, 406 S.C. at 342, 751 S.E.2d at 654-55; Rule 802, SCRE; *see also State v. Young*, 420 S.C. 608, 628, 803 S.E.2d 888, 898-99 (Ct. App. 2017) (error is harmless where it is clear beyond a reasonable doubt that a rational jury would have found defendant guilty absent the error).

CONCLUSION

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



Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 9th day of December, 2022.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Robert Lee Carter 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 Deandrea G. Benjamin, which was held on March 14 - 16, 2022, 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 Robert Lee Carter.

Respectfully Submitted,

Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 9th day of December, 2022.

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Dec 09 2022
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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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This 9th day of December, 2022.

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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 Robert Lee Carter, #244427, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 9th day of December, 2022.

Joanna K. Delany
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