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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Honorable Paul M. Burch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SHAQUILLE KAYSON BLAKELEY,

APPELLANT

APPELLATE CASE NO. 2022-001313

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court reversibly erred by admitting a record extracted from a cell phone into evidence over an objection to lack of foundation where the witness was neither the person who extracted the information from the cell phone nor a records custodian from the police or phone company, where the State also failed to lay foundation as to the mode of preparation of the document, or if it was made in the regular course of business at or near the time of the event, and where the court failed to opine whether the sources of information, method, and time of preparation justified admission?

STATEMENT OF THE CASE

Appellant Shaquille Kayson Blakeley was indicted by the Horry County Grand Jury for armed robbery, kidnapping, and possession of a weapon during the commission of a violent crime. Tr. 4, ll.4-17; Tr. * (Indictments). His case proceeded to trial before the Honorable Paul Burch and a jury from September 9th through 12th, 2022. Appellant was represented by Nicholas O'Neil and Eric Fox, while the State was represented by James Stanko and Joshua Halford. Tr. 1; Tr. 7, ll. 16-17. Appellant was found guilty, and the trial court sentenced him to consecutive sentences of thirty (30) years, ten (10) years, and five (5) years imprisonment. Tr. 223, l. 14—Tr. 224, l. 2; Tr. * (Sentence Sheets).

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. Mealor, 425 S.C. 625, 637, 825 S.E.2d 53, 60 (Ct. App. 2019) (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." State v. Brown, 424 S.C. 479, 487, 818 S.E.2d 735, 740 (2018) (quoting State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006)).

STATEMENT OF THE FACTS

On the night of Thursday, October 8, 2020, Adam Powalie (Powalie) was at his brother's home in Horry County watching the Buccaneers play the Bears on television. Tr. 131; ll. 5-13; Tr. 160, ll. 13-21. The game ended around 11:30 pm, Powalie remained and "spoke a few minutes" with his brother, after which he drove his truck to the Taco Bell in Socastee approximately "ten minutes or so" away. Tr. 131, ll. 14-19; Tr. 160, l. 22—Tr. 161, l. 9. On his drive, Powalie purportedly called a friend from his cell phone and talked throughout the ten-minute drive. Tr. 133, ll. 3-19. Powalie arrived at Taco Bell at approximately 12:50 am. Tr. 161, ll. 16-18. After ordering his food in the drive-through, Powalie was asked to pull forward and await his order. Tr. 37, l. 22—Tr. 38, l. 12; Tr. 133, l. 15-Tr. 134, l. 22.

While briefly attempting to call his friend again, a white SUV pulled-up next to Powalie. A woman (Woman 1) got out, pointed a handgun at him while a man pointed an AR pistol[1] at Powalie from the back seat of the SUV. The woman got into the front passenger seat of Powalie's red Ford F-150 and instructed him to drive to a BB&T bank across the street. Tr. 39, l.13—Tr. 40, l. 25; Tr. 135, l. 9—Tr. 136, l. 9; Tr. 137, l. 9—Tr. 138, l. 12. After failing to obtain funds from that ATM and hearing sirens, the two vehicles left. Shortly after, they stopped in a vacant lot where Powalie switched vehicles with another female passenger (Woman 2) in the White SUV; he moved to the front passenger seat of the white SUV, Woman 2 moved to the passenger seat of his truck, which Woman 1 then drove. A third woman (Woman 3) drove the white SUV.[2] Powalie did not turn around to look in the back seat where Appellant was allegedly sitting due to fear of

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[1] Although having a similar appearance to a rifle, the firearm collected by police and identified by Powalie was actually an AR pistol chambered to fire rifle caliber ammunition. Tr. 99, l. 24—Tr. 100, l. 15.

[2] Collectively, Woman 1, Woman 2, and Woman 3 will be referred to as Women.

the gun pointed at him; however, he claimed to have later learned that a male juvenile was also in the back seat. Tr. 138, l.13—Tr. 140, l. 8; Tr. 148, ll 10-19.

The two vehicles stopped at several banks and Circle K gas station ATM's, yet at no time did Powalie attempt to notify clerks or security staff of his predicament due to fear of being shot, even at times when none of the assailants were with him inside the stores. Tr. 145, ll. 2-25; Tr. 162, l. 7—Tr. 164, l. 19; Tr. 165, l. 22—Tr. 166, l. 8.

Eventually they stopped at the Days Inn. Video footage from the hotel showed a person other than Appellant concealing a large bulky item under their clothing when she entered the building. Tr. 126, l. 23—Tr. 127, l. 4. Once Powalie, the three Women, and Appellant were in their fifth-floor room at the Days Inn, Powalie called his wife at approximately 2:18 am from a cell phone other than his own. Powalie testified that he was forced at gunpoint to say he had a drug habit, owed money, and sought the title to his truck. He further said he refused offers of sex and drugs from his captors. Tr. 152, l. 6—Tr. 155, l. 22; Tr. 165, ll. 15-21.

Later the same morning, Horry County Police Department officers arrived at the Days Inn. The juvenile was found sleeping in the white SUV and taken into custody. Approximately six officers then went to room 518, opened the door with the key, and then spent approximately 15-20 seconds kicking in the door due to the door chain being in place. Tr. 71, l. 22—Tr. 74, l. 8; Tr. 75, l. 3—Tr. 76, l. 13. The three Women were taken from the room and placed in custody. Police then arrested Appellant after removing him from beneath the bed.[3]

Police collected evidence from the room and camera footage from several ATM locations. However, no fingerprints or DNA from the AR pistol were taken or sent for testing, and Appellant

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[3] "Now let's address the elephant in the room. We've all seen it: Mr. Blakeley is in a wheelchair." Tr. 30, ll. 20-21. Police indicated Appellant only "passively" resisted, and claimed they were not aware he was handicapped until he told them. Tr. 97, l. 1—Tr. 98, l. 6; Tr. 111, ll. 2-7.

did not appear on the ATM videos. Tr. 125, l. 5—Tr. 126, l. 6; Tr. 128, l. 17—Tr. 129, l. 5. Further, police performed a data extraction on Powalie's cell phone. The phone was sent to personnel able to perform the work, and then the results were sent back to police. Tr. 122, l. 11—Tr. 123, l. 7; Tr. 128, ll. 7-16. With Powalie on the stand, the State sought admission of a document from the extraction. Although Powalie acknowledged he saw "a copy of the download from [his] phone," indicated he "reviewed it," and answered "yes, sir" to the prosecutor's question of whether the record was "from his cell phone that night," Powalie never stated how he came into possession of the document, how the it was prepared, or whether it were made in the regular course of the police or cell phone company's business at or near the time of the information recorded. Tr. 131, l. 23—Tr. 132, l. 11. Appellant objected, arguing the State needed to lay the proper foundation and have the individual who extracted the information from Powalie's cell phone testify before it is admissible. Tr. 132, ll. 17-20. The State responded as follows:

> Your honor, they are his cell phone records. He already said they were his cell phone records and familiar with them. I think that is enough to authenticate that the records are true and accurate.

Tr, 132, ll. 21-25. The trial court admitted the records by stating: "Overruled." Tr. 133, l. 1.

The State then utilized the record corroborate Powalie's story regarding what he did during his drive from his brother's to Taco Bell, and to help explain why the call to his friend was so short when he was waiting for his food. Further, the text message from Powalie's friend was included as part of the information admitted. Tr. 133, l. 3-Tr. 135, l. 5; Tr.* (State's Exhibit #23).

The jury found Appellant guilty as charged. The trial court sentenced him to thirty (30 Years for armed robbery, ten (10) years for kidnapping, and five (5) years for possession of a weapon during the commission of a violent crime. Tr. 223, l. 14—Tr. 224, l. 2.

This appeal follows.

ARGUMENT

The trial court reversibly erred by admitting a record extracted from a cell phone into evidence over an objection to lack of foundation where the witness was neither the person who extracted the information from the cell phone nor a records custodian from the police or phone company, where the State also failed to lay foundation as to the mode of preparation of the document, or if it was made in the regular course of business at or near the time of the event, and where the court failed to opine whether the sources of information, method, and time of preparation justified admission.

The trial court erred by admitting a record extracted from Powalie's cell phone without requiring the State to first meet its burden of laying the proper foundation for this category of documents. Where, as here, the State sought admission of a business record derived from a cell phone extraction, the proper foundational requirements[4] are found in Uniform Business Records as Evidence Act:

> A record of an act, condition or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity *and* the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

S.C. Code Ann. §19-5-510 (West, Westlaw current through 2022 Act. No. 268) (emphasis added). In other words, prior to admission the State was required to show not only that Powalie was either "the custodian or other qualified witness" of the document derived from the cell phone data extraction, but also that he identified the document itself "and the mode of [their] preparation, and

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[4] While Appellant did not raise the objection of hearsay, his objection to foundation necessarily addresses the foundational requirements found in S.C. Code Ann. §19-5-510 necessary for admission of the document at issue. Accordingly, the matter should be deemed preserved. See, e.g., State v. Brannon, 388 S.C. 498, 697 S.E.2d 593 (2010) ("Error preservation rules do not require a party to use the exact name of a legal doctrine in order to preserve an issue for appellate review. Instead, a litigant is only required to raise the issue to the trial court giving it a fair opportunity to rule on the issue.").

if [they were] made in the regular course of business, at or near the time of the act, condition or event." Id.

In the present case, the only matter to which the State offered any foundational testimony merely addressed the potential identity of the document—yet even that is suspect since Powalie did not conduct the extraction, nor did her produce the report, nor did he indicate whether such reports were made in the regular course of business—either by the cell phone company or the Horry County Police Department—for the simple reason that he is not employed by either organization in any capacity, much less in the role of an evidence custodian or expert. Tr. 122, l. 11—Tr. 123, l. 7; Tr. 128, ll. 7-16; Tr. 131, l. 23—Tr. 132, l. 11.

Further, the fact that Powalie is the owner of the cell phone is of no moment because he was testifying as to a record that was the product of machines manipulating and extracting data. In other words, the State's argument that Powalie's testimony was sufficient to authenticate the record likewise fails. In this way, it would be similar to a lay witness testifying to GPS records derived from a download of his GPS device. As our Supreme Court instructed in State v. Brown, 424 S.C. 479, 489-90, 818 S.E.2d 735, 741 (2018):

> "Any concerns about the reliability of such machine-generated information is addressed through the process of authentication ...." "When information provided by machines is mainly a product of 'mechanical measurement or manipulation of data by well-accepted scientific or mathematical techniques,' " then "a foundation must be established for the information through authentication, which Federal Rule of Evidence 901(b)(9) allows such proof to be authenticated by evidence 'describing [the] process or system used to produce [the] result' and showing it 'produces an accurate result.' "
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> . . . .
>
> Thus, we hold that the State needed to present "[e]vidence describing [the] process or system used to produce" the GPS records and "showing that the process or system produces an accurate result" in accordance with Rule 901(b)(9), SCRE, to authenticate Wilson's GPS records in this case.

Id. (quoting United States v. Washington, 498 F.3d 225, 231 (4th Cir. 2007)) (internal citations omitted). The witness required to lay the proper foundation for admission of such reports should have experience with the system utilized and provide testimony describing the "system, the process used in generating or obtaining the records, and how this process has produced accurate results for the particular device or data at issue." Id. 424 S.C. at 492, 818 S.E.2d at 743; see also State v. McFarlane, 279 S.C. 327, 330, 306 S.E.2d 611, 612-13 (1983) (affirming denial of admission of medical records where York County Sheriff's detective could not testify "to the identity or mode of preparation of the report or whether it was made in the regular course of business at or near the time of the accident.").

Here, the record was the product of cell phone extraction, which the investigating officer indicated that even he cannot do himself but instead must send-off the cell phone to others who have the knowledge and experience with the systems and processes needed to complete the extraction and produce the records. Tr. 122, l. 11—Tr. 123, l. 7; Tr. 128, ll. 7-16. Yet, the State proffered no witness qualified to provide the foundational testimony required for authenticating the cell phone extraction record in question. What is more, the trial court failed to opine whether "the sources of information, method and time of preparation were such as to justify its admission." S.C. Code §19-5-510 Ann. (West, Westlaw current through 2022 Act. No. 268). Accordingly, the trial court erred in admitting the cell phone record.

Appellant was also prejudiced from the admission of the extracted cell phone record. As indicated by the defense in both opening and closing arguments, the case against Appellant relied heavily upon the credibility of Powalie's testimony. Tr. 35, ll. 5-23; Tr. 193, l. 6—Tr. 194, l. 18; Tr. 197, l. 4—Tr. 198, l. 16. The State's case against Appellant produced no corroborating videos or photographs depicting Appellant with an AR pistol or any other firearm, nor was Appellant

depicted in the videos from BB&T and Circle K where Powalie was at ATMs. Tr. 125, l. 5—Tr. 126, l. 6; Tr. 128, l. 17—Tr. 129, l. 5. Further, no fingerprint or DNA evidence identified Appellant as the wielder of the AR pistol, which is also contrary to Powalie's version of events. Thus, Powalie's testimony was crucial to proving the State's theory of Appellant's involvement. As such, Appellant was prejudiced when the State utilized the inadmissible phone record to corroborate a portion of Powalie's testimony before the jury as it helped bolster his credibility.

CONCLUSION

For the foregoing reasons, Appellant Shaquille Blakeley respectfully requests this Court to reverse his convictions and grant a new trial.

Breen Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

This 15th day of December, 2022.

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STATE OF SOUTH CAROLINA

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Appeal from Horry County

Honorable Paul M. Burch, Circuit Court Judge

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SHAQUILLE KAYSON BLAKELEY,

APPELLANT

APPELLATE CASE NO. 2022-001313

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Initial 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), this 15th day of December, 2022.

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Appellate Defender

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ATTORNEY FOR APPELLANT

From: Stock, Chris
To: SC - BLITCH WILLIAM; SC - COLLINS CAROLINE
Cc: Stevens, Breen
Subject: Blakeley, S. - Initial Brief of Appellant - 2022-001313
Date: Thursday, December 15, 2022 1:51:00 PM
Attachments: Blakeley, S. - Initial Brief of Appellant - 2022-001313.pdf
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Mr. Blitch,

Please find attached for service the Initial Brief of Appellant and Designation of Matter for Shaquille Blakeley's appeal which will be filed today with the Court of Appeals.

Thank you.

Chris

Chris Stock
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