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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

XZARIERA OKEVIS GRAY,

APPELLANT

APPELLATE CASE NO. 2019-001109

Appeal from Greenwood County

Honorable Frank R. Addy, Circuit Court Judge

Opinion No. 5951

PETITION FOR REHEARING

On November 23, 2022, this Court remanded Appellant's case to the trial court to make specific findings that support its determination of whether Appellant is entitled to immunity under the Protection of Persons and Property Act.[1] State v. Gray, Op. No. 5951 (S.C. Ct. App. filed Nov. 23, 2022) (Howard Adv. Sh. No. 41 at 34). This Court also affirmed (1) the trial court's admission of a surveillance video and (2) the denial of appellant's motion for a new trial without a hearing. Pursuant to Rule 221(a), SCACR Appellant respectfully requests this Court withdraw the opinion and reissue it with the portions concerning the issues that arose during the

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1 See S.C. Code Ann. §§ 16-11-410 to -450 (2015).

trial removed. Appellant requests this action so that his case may be remanded to the trial court for consideration of his request for immunity. If the trial judge grants immunity, then this Court's opinion regarding the legal issues that arose during trial is advisory in nature. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating that an appellate court need not address other issues when disposition of another issue is dispositive). An appellate court renders an advisory opinion when commenting on an issue will have no practical effect on the outcome of the case. Comm'r of Public Works v. S.C. Dept. of Health & Environmental Control, 372 S.C. 351, 363, 641 S.E.2d 763, 769 (Ct. App. 2007). "[A] court is not permitted to issue advisory opinions." McDill v. Nationwide Mut. Ins. Co., 368 S.C. 29, 32, 627 S.E.2d 749, 750 (Ct. App. 2006). If the trial judge denies his request for immunity, then the denial may be considered along with the legal issues that arose during trial in a subsequent appeal.

In the alternative to withdrawing and reissuing the opinion, Appellant respectfully requests rehearing pursuant to Rule 221(a), SCACR, on the two legal issues that arose during his trial considering the significant points overlooked and/or misapprehended by this Court discussed below.

Surveillance Video

In its opinion affirming the trial court's admission of the surveillance video this Court found (1) the state properly authenticated the video and (2) the probative value of the video was not substantially outweighed by the danger of confusing or misleading the jury.

Authentication

This Court found Jeovani Vacquec's personal knowledge was sufficient to authenticate the surveillance video where he testified that he owned and operated the security system that

recorded the video, the camera that recorded the video faced the area where the shooting occurred, and the time stamp on the video was incorrect because he had not set the date or time when setting up the security system.

One of the most common ways for the proponent to authenticate evidence is through the testimony of a witness with knowledge that the "matter is what it is claimed to be." See Rule 901(b)(1), SCRE. Another way to authenticate evidence is by showing the evidence contains "distinctive characteristics and the like." Rule 901(b)(4), SCRE. "Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances" may serve to authenticate evidence. Id.; see also State v. Anderson, 386 S.C. 120, 129, 687 S.E.2d 35, 39-40 (2009) (finding a master fingerprint card authenticated where an expert explained the prints on the master card were taken at a correctional facility on a specific date, and assigned a unique state identifying number).

Here, Vacquec did not have personal knowledge sufficient to lay a foundation from which a reasonable juror could find the evidence was what the state claimed where he was not present at the scene shown on the video and was not watching the monitor at the time of the shooting. Additionally, the state conceded at trial, no witness could say the contents of the video were what the state purported them to be because no witness had personal knowledge of the events. At trial, Vacquec's testimony was that he had eight cameras on his property and that he checked them "pretty regularly" to make sure they worked. R. 95, 11 23-25; R. 96, ll. 10-11. He also testified that he installed the cameras without adjusting the date and time. R. 97, ll. 1-5. Vacquec testified that the cameras were constantly recording and after a few months the recordings "erase" and start over. R. 96, ll. 12-16.

However, Vacquec did not even know the name brand of the video system. He was

unable to describe how the system worked in even the most rudimentary of terms. Most importantly, he was unable to say if or how the system produced an accurate result as required by the plain language of Rule 901(b)(9), SCRE. Vacquec was simply unable to present the necessary foundation for the state to authenticate the video through personal knowledge.

In its opinion this Court cited to State v. Green, for the proposition that "the authentication standard is not high, and a party need not rule out any possibility the evidence is not authentic." 427 S.C. 223, 230, 830 S.E.2d 711, 714 (Ct. App. 2019). Nonetheless, this case does not even meet the very low bar discussed in Green.

In Green, this Court held the state authenticated Facebook messages despite neither the sender nor the recipient testifying. Id. at 232-233, 830 S.E.2d at 715-716. Rather, a witness testified that a co-defendant, who was not on trial, used the name "Ruby Rina" on Facebook. Id. at 228, 830 S.E.2d at 713. In that case there were "numerous facts" linking the Facebook messages to the co-defendant and consequently to Green. Id. at 233, 830 S.E.2d at 715-716. This Court held "the content of the messages was distinctive enough that a reasonable jury could find [co-defendant] wrote them." Id. at 233, 830 S.E.2d at 715. This Court held that "[t]aken together, these circumstances serve as sufficient authentication to meet the low bar Rule 901(b)(4), SCRE, sets." Id. at 233, 830 S.E.2d at 716.

Here, unlike in Green, there was no additional circumstantial evidence presented by the state, through witnesses or other evidence, to establish the video was from the morning in question or that it was accurately recorded. The only evidence the state put forth was Vacquec's limited testimony.

Rule 403

In the opinion, this Court found that the video was "highly probative because it provided

an alternative perspective of the shooting that was objective and neutral," and that it clearly contradicted Appellant's testimony because it showed more than two people in and around the yard at the time of the shooting. Notably, this Court stated that the quality of the video made it "difficult to discern what happened," however, the jury was able to watch it numerous times making it unlikely to cause confusion.

"'Probative' means '[t]ending to prove or disprove.'" State v. Gray, 408 S.C. 601, 609, 759 S.E.2d 160, 165 (Ct. App. 2014). "'Probative value' is the measure of the importance of that tendency to the outcome of a case." Id. at 610, 759 S.E.2d at 165. While relevant evidence and probative evidence are not synonymous, the two share many similarities as demonstrated through their definitions. The probative value of evidence is directly related to the how important that evidence is in assisting the jury in rendering a verdict. Id. Thus, when analyzing the probative value of evidence, the court must consider the importance of the evidence as it relates to the issues presented in the case. State v. Lee, 399 S.C. 521, 528, 732 S.E.2d 225, 228 (Ct. App. 2012).

Respectfully, the surveillance video cannot be both "highly probative" and "difficult to discern." The video is, as the Court stated, "difficult to discern." It is impossible to see what is happening in the video. The scene was very dark, and the camera was too far away to allow the viewer to identify anyone. The video showed an unknown number of unidentified people moving in unknown directions for unknown reasons. Accordingly, the probative value of the video was very low. While it purported to show the actual shooting, which would be highly probative, the *quality* of the video showed it was of very little probative value. Examining the probative value also explains how the video was misleading and confusing to the jury.

The state interpreted the video for the jury based on its view of the facts without any actual evidentiary support. The jury's repeated viewing of the video did not lessen the potential for

confusion. Instead, it demonstrated that there was confusion regarding what exactly the video depicted, making it necessary for the jury to view it several times. The dark, grainy video was confusing, misleading, and posed an unreasonably high degree of unfair prejudice to Appellant. When balanced against the low probative value offered, the video should have been excluded. Accordingly, Appellant respectfully requests this Court reverse Appellant's conviction based on the trial court's erroneous admission of the surveillance video.

Motion for New Trial

This Court found that the trial court recognized appellant's requested inquiry was prohibited by Rule 606(b), SCRE because the requested inquiry would have involved juror testimony about internal influences unrelated to fundamental fairness. Therefore, the trial court did not abuse its discretion when it denied appellant's motion for a new trial without a hearing.

The South Carolina Rules of Evidence provide:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, **except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror**. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Rule, 606(b) SCRE.

The inquiry suggested here was not prohibited under Rule 606(b), SCRE. The inquiry would not have caused the jurors to reveal the subject matter of their deliberations. Instead, it fell under the exception to the rule that allows inquiry of the jurors solely on external factors that

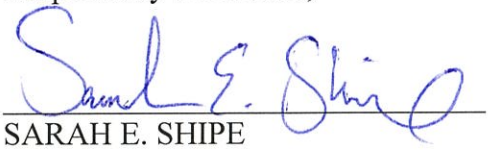
may have resulted in their feeling coerced. Specifically, Appellant requested a hearing on his motion for a new trial to permit the questioning of jurors regarding (1) the impact of the length of the deliberations on their ability to deliberate, (2) impact of the lack of nourishment on their ability to deliberate; and (3) what their understanding of whether a verdict had to be rendered was and any impact any misunderstandings may have had on the verdict.

The record reflects that the jury deliberated for over ten hours and received only one meal. After receiving the verdict, the trial judge indicated his blood sugar was low and he was fatigued. He candidly told the parties he would prefer not to go forward with sentencing that evening because he was not at the "top of his game" due to his lack of food and his lack of rest. The same was true for the jurors. The true impact of the length of the deliberations coupled with the lack of food and the imprecise instructions regarding rendering a verdict was unknown until Appellant discovered a social media post from a juror showing the juror believed it was necessary to render a verdict and it had to be rendered that day.

The above referenced social media post was the after discovered evidence which led to Appellant's request for a new trial under Rule 29(b) of the Rules of Criminal Procedure. A motion for a new trial based on after-discovered evidence must be made within one year after the date of actual discovery of the evidence. A motion for a new trial based on after-discovered evidence must be granted if the evidence "(1) is such that it would probably change the result if a new trial were granted; (2) has been discovered since the trial; (3) could not in the exercise of due diligence have been discovered prior to trial; (4) is material; and (5) is not merely cumulative or impeaching." State v. Mercer, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009)(citing State v. Spann, 334 S.C. 618, 619-620, 513 S.E.2d 98, 99 (1999)).

Had the true impact of the length of the deliberations without food and the vague instructions been known, there is a reasonable probability that it would have changed the verdict. The social media post was discovered after the trial and could not have been discovered prior to trial. The information contained within the post was not merely impeaching or cumulative to any other information available at trial and was not known at the time of trial. Considering the prima facie case Appellant respectfully requests a hearing on his motion for new trial.

Respectfully Submitted,



SARAH E. SHIPE
Appellate Defender

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Appellate Defender

ATTORNEYS FOR APPELLANT

This 8th day of December, 2022.

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STATE OF SOUTH CAROLINA

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Honorable Frank R. Addy, Circuit Court Judge

THE STATE,

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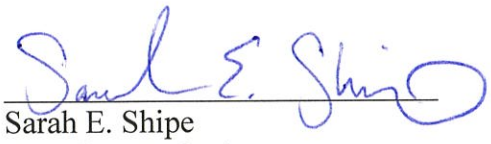
XZARIERA OKEVIS GRAY,

APPELLANT

APPELLATE CASE NO. 2019-001109

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-entitled case has been served upon Melody Brown, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), which is mbrown@scag.gov;; and Xzariera Okevis Gray, #325069, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 8th day of December, 2022.



Sarah E. Shipe
Appellate Defender

ATTORNEY FOR APPELLANT

From: Stock, Chris
To: SC - BROWN MELODY; Angela Brown
Cc: Hackett, Susan; Shipe, Sarah
Subject: Gray, X-petition for rehearing-2019-001109
Date: Thursday, December 8, 2022 10:41:00 AM
Attachments: Gray, X-petition for rehearing-2019-001109.pdf
Gray, X-ag letter 12.8.22.pdf

Ms. Brown,

Please find attached for service the Petition for Rehearing for Xzariera Gray's appeal which will be filed today with the Court of Appeals.

Thank you.

Chris

Chris Stock
Administrative Assistant
Commission on Indigent Defense
Appellate Division
(803) 734-1330