STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Jasper County
Honorable Robert J. Bonds, Circuit Court Judge
Appellate Case No. 2022-000360

The State, Respondent,

vs.

Leslie Keiffer, Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

Adverse inference jury instructions are rarely permitted in criminal cases and a high threshold must be met to warrant one. When a party fails to show that the evidence was destroyed in bad faith or that it contained an apparent exculpatory value that was unobtainable by other means, the jury charge should not be granted. Did the trial court err in refusing to instruct the jury that they may draw an adverse inference from the unintentional destruction of evidence?

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

Appellant married Tammy Keiffer in 2016 after meeting her a year earlier. (Trial Tr. March 15, 98:20-99:7; R. at __:__.) The two lived together at their home in Jasper County. (Trial Tr. March 15, 92:1-13; R. at __:__.) Previous calls to 911 had been made from the residence, alleging domestic disputes between both Appellant and Tammy. (Trial Tr. March 15, 164:20-23 R. at __:__.) On March 7, 2020, both Tammy and Appellant made separate calls to 911 alleging a domestic incident. (Trial Tr. March 15, 52:3-22; R. at __:__.) Officer Lachlisha Johnson responded to the scene and activated her body worn camera. (Trial Tr. March 15, 69:16-18; R. at __:__.)

The allegations from both women differed, with each stating that the other was the primary aggressor. Tammy testified that while arguing over property, Appellant lunged at her from across the bar in their kitchen. (Trial Tr. March 15, 93:4-94:7; R. at __:__.) She then retreated to the safety of a bedroom but could hear Appellant tearing the kitchen apart with what she determined was a hammer. (Trial Tr. March 15, 93:6-24; R. at __:__.) Tammy stated that Appellant came into the bedroom, threw an ashtray at her, and began choking her. (Trial Tr. March 15, 94:3-11; R. at __:__.) Appellant then dragged Tammy into their bedroom and left the house. (Trial Tr. March 15, 94:23-95:2; R. at __:__.) Tammy then managed to call 911. (Trial Tr. March 15, 95:3-4; R. at __:__.)

Appellant claimed that she and Tammy had gotten into a "spat" which resulted in Tammy pulling Appellant from her chair to the ground and ultimately choking her. (Trial Tr. March 15, 145:12-14, 148:6-149:11; R. at __:__.) Appellant stated she scratched Tammy's arm and face to get her to release her. (Trial Tr. March 15, 150:8, 151:14-20; R. at __:__.) She stated she was so scared that she urinated on herself. (Trial Tr. March 15, 153:7; R. at __:__.) Even in her version of events, Appellant concedes that she dragged Tammy into their bedroom, shut the door, and

called 911. (Trial Tr. March 15, 158:17-159:4; R. at __:__.) She then left the house. (Trial Tr. March 15, 159:4;R. at __:__.)

Officer Johnson reported to the scene and took statements and photographs. (Trial Tr. March 15, 56:13-18, 59:6-22, 64:24-65:12, 65:20-66:1; R. at __:__.) According to Officer Johnson's testimony, she returned to the station and docked her body worn camera consistent with standard operating procedure. (Trial Tr. March 15, 69:16-23, R. at __:__.) Yet, through no fault of her own, the body worn camera footage never successfully uploaded to the server and was lost. (Trial Tr. March 15, 76:2-18; R. at __:__.) Efforts to retrieve it since were unsuccessful. (Trial Tr. March 15, 76:18; R. at __:__.)

Before trial, Appellant made a motion to dismiss for the State failing to comply with Brady v. Maryland. (Trial Tr. March 15, 4:15-25; R. at __:__.) Appellant argued that because there was no body worn camera footage from Officer Johnson, she was unable to provide an effective defense. (Trial Tr. March 15, 13:1-6; R. at __:__.) The State argued that dismissal was not the proper remedy. (Trial Tr. March 15, 15:7-9; R. at __:__.) The trial court agreed, and denied the motion. (Trial Tr. March 15, 16:6-18:3; R. at __:__.)

At trial, Appellant was able to cross-examine Officer Johnson about the lost body worn camera footage in front of the jury. (Trial Tr. March 15, 70:24-78:4; R. at __:__.) She was also able to cross-examine Tammy about the veracity of her allegations using photographs taken at the scene. (Trial Tr. March 15, 101:13, 104:17-21, 105:10-108:6; R. at __:__.) Finally, Appellant testified to her version of events. (Trial Tr. March 15, 127:5-181:1; R. at __:__.)

During the charging conference, Appellant asked the trial court to give a jury instruction on evidence spoliation, also known as an adverse inference jury instruction. (Trial Tr. March 15, 192:24-200:8 thru 99:7; R. at __:__.) The State countered that a such a rare charge was improper,

citing State v. Breeze and State v. McBride. (Trial Tr. March 15, 193:5-194:6; R. at __:__.) Although Appellant made an argument for why this case was distinct from both Breeze and McBride, the trial court declined to charge on the spoliation of evidence, citing State v. Cheeseboro. (Trial Tr. March 16, 6:9-9:21; R. at __:__.) The trial court did, however, charge the jury on self-defense. (Trial Tr. March 16, 69:11-70:17; R. at __:__.)

The jury deliberated and returned a verdict of "guilty." (Trial Tr. March 16, 86:3-7; R. at __:__.) Appellant moved for a new trial, but did not raise a Due Process Violation under Brady v. Maryland, only that the court erred in failing to provide the adverse inference jury instruction. (App. Br. At 4.)

STANDARD OF REVIEW

"An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." State v. Williams, 367 S.C. 192, 195, 624 S.E.2d 443, 445 (Ct. App. 2005). "The requesting party must have been prejudiced by the trial court's failure to give the instruction in order to warrant reversal on appeal." Id. at 195–96, 624 S.E.2d at 445.

ARGUMENT

I. The trial court did not err in refusing to instruct the jury that it may draw an adverse inference against the State where body worn camera footage was lost through no fault of the officer.

A. Adverse inference jury instructions are rarely permitted in criminal cases and are appropriately analyzed under the Cheeseboro standard.

Appellant contends the trial court erred in refusing to instruct the jury that it may draw an adverse inference against the State when the video footage of the scene and interviews of both the complaining witnesses was lost, and credibility was central in the case. She is wrong; courts do not give such an instruction where the evidence was not intentionally destroyed.

By Appellant's own admission, adverse inference charges are "rarely permitted in criminal cases." State v. McBride, 416 S.C. 379, 389, 786 S.E.2d 435, 440 (Ct. App. 2016) (citing State v. Reaves, 414 S.C. 118, 128 n.5, 777 S.E.2d 213, 218 n.5 (2015)). "A charge of this proposition to a jury on . . . behalf of either the State or the defense is not warranted except under most unusual circumstances[.]" State v. Batson, 261 S.C. 128, 138, 198 S.E.2d 517, 522 (1973). Because "the trial judge is required to charge only the current and correct law in South Carolina," an adverse inference charge in this case was not appropriate. State v. Burkhart, 350 S.C. 252, 261, 565 S.E.2d 298, 302-03 (2002).

Despite this concession, Appellant argued that current case law does not prohibit adverse inference charges in criminal cases and this case warranted one, stating that it was improper for the trial court to analyze the charging request under State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001) . Yet McBride—relied upon by Appellant for her argument that the trial court erred—uses the test laid out in Cheeseboro to determine whether there was a Due Process Clause violation, thus requiring the remedy of an adverse inference instruction. McBride, S.C. at 388, 786 S.E.2d at

439. Analyzing the loss of the body worn camera footage in this case under the analysis laid out in Cheeseboro was appropriate and proper in light of the Court of Appeals' decision in McBride.

The State does not have an absolute duty to preserve potentially useful evidence that might exonerate a defendant. State v. Cheeseboro, 346 S.C. 526, 538, 552 S.E.2d 300, 307 (2001) (citing Arizona v. Youngblood, 488 U.S. 51, 58 (1988)). A defendant must demonstrate either: (1) the State destroyed evidence in bad faith; or (2) the evidence's exculpatory value was readily apparent before the evidence was destroyed, and the defendant cannot obtain other evidence of comparable value by other means. Id. The bad faith requirement limits the extent of the State's obligation to preserve evidence to reasonable bounds and confines it to cases in which the police conduct indicates the evidence could form a basis for exonerating the defendant. Youngblood, 488 U.S. at 58.

It was under this Cheeseboro test that the trial court appropriately analyzed Appellant's claim and rejected it.

B. Appellant failed to meet the appropriate threshold to establish a Due Process violation and was not entitled to an adverse inference jury instruction

To receive an adverse inference jury instruction, Appellant must have established that the body worn camera footage lost by Officer Johnson was "destroyed . . . in bad faith[.]" State v. Breeze, 379 S.C. 538, 545, 665 S.E.2d 247, 251 (2008) (citing Cheeseboro, at 538–39, 552 S.E.2d at 307). At best, Appellant managed to show that the body worn camera footage was lost inadvertently and not in bad faith. Appellant's questioning of Officer Johnson showed that she did not intentionally delete the body worn camera footage, but rather that she docked her camera at the end of her shift, pursuant to standard practices, but that the footage simply never uploaded. (Trial Tr. March 15, 76:2-18; R. at __:__.) In fact, during examinations, Officer Johnson testified that she could not delete or edit any of the body worn camera information. (Trial Tr. March 15,

73:24-74:1; R. at __:__.) There was never an argument by Appellant that Officer Johnson intentionally destroyed this evidence or that she did so in bad faith.

That the body worn camera footage failed to upload through no fault of the officer mirrors the loss of evidence in Cheeseboro. There, officers destroyed a gun connected to a barbershop murder after following normal procedures. Cheeseboro, S.C. at 538, 552 S.E.2d at 306. The court held that while the destruction of the weapon showed "...evidence of lack of care, there is no evidence of an intentional destruction of relevant evidence in this case". Id. at 539, 552 S.E.2d at 307. Similarly in this case, while not following up to see if the body worn camera footage was properly uploaded before leaving that night potentially showed a lack of care on an officer's behalf, it does not show that there was an intentional destruction of the footage. Appellant has failed to meet the first prong of the test established by Cheeseboro.

The facts here track those from Breeze, where marijuana was destroyed because of an officer's belief that the case was "disposed." State v. Breeze, 379 S.C. 538, 545, 665 S.E.2d 247, 251 (2008). From this misunderstanding, our Court of Appeals concluded that "the State's actions were not in bad faith but rather an inadvertent mistake." Id. at 546, 665 S.E.2d at 251.

Recognizing she cannot prove an intentional destruction of the footage, Appellant must turn to the second prong, claiming that the lost evidence possessed an "exculpatory value" that was crucial to her case. Appellant argues that this case was based on credibility, and that the body worn camera footage would have allowed the jurors to assess the credibility of each witness at the date and time of the alleged incident. (App. Br. at 12-13.) This argument only partially reflects the second prong of Cheeseboro, which requires a defendant to prove that the lost evidence "possessed an exculpatory value apparent before the evidence was destroyed and the defendant cannot obtain

other evidence of comparable value by other means." Cheeseboro, S.C. at 538–39, 552 S.E.2d at 307.

Even if the body worn camera footage would have allowed the jurors to assess the credibility of the witnesses, that does not establish the footage possessed an apparent exculpatory value. Appellant argued that body worn camera footage "would have exculpatory value because you're looking at the scene, the victim in this case has testified there was broken glass, there was a kitchen that was destroyed, none of those things is in these pictures." (Trial Tr. March 16, 4:10-16; R. at __:__.). Though Appellant argues what the body worn camera footage *may* have shown, she failed to establish in her questioning of Officer Johnson that the footage *did*, in fact, contain that information, or even that such evidence was exculpatory. Appellant did not ask Officer Johnson if she saw the broken window, even though she claims that whether or not the window was broken was critical to the credibility of Tammy and Appellant. (Trial Tr. March 15, 70:6-88:10; R. at __:__.) If Officer Johnson didn't see the broken window, then her body worn camera wouldn't have seen it either; Appellant failed to elicit this information and failed to establish that the body worn camera footage had an apparent exculpatory value.

Assuming for the sake of argument that the footage would have shown exculpatory evidence, Appellant still must make a further showing. She must establish that she was unable to obtain the exculpatory evidence by other means. Cheeseboro, at 539, 552 S.E.2d at 307. Although Appellant claimed below that she could not "obtain that information in any other way," the trial presented ample opportunities to obtain the same evidence by other means. (Trial Tr. March 16, 4:21-24; R. at __:__.) *First*, both Appellant and Tammy testified at trial, giving the jury the opportunity to assess their credibility.. Appellant questioned Tammy extensively about the allegations on cross-examination about the state of the scene when officers arrived. The 911 calls

from both Appellant and Tammy were played during trial, allowing the jury to hear what they sounded like at the time of the incident. (Trial Tr. March 15, 53:9; R. at __:__.) The jury had ample opportunity to assess these two witnesses, ultimately crediting Tammy's allegations of domestic violence over Appellants' claims.

Second, Officer Johnson's investigative report memorializing the case, as well as photos of the scene were provided to Appellant before trial, and were available for her use. For example, Tammy testified that Appellant broke a window in the kitchen with a hammer during the altercation. (Trial Tr. March 15, 93:22-23; R. at __:__) . Appellant contends that the footage would have shown that Tammy lied about this broken window. (App. Br. at 12 and 13) Yet Appellant did not ask Officer Johnson a single question about whether she saw a broken window. Appellant easily could have asked whether she saw that broken window as a way to later attack Tammy's credibility. Appellant's strategic decision to not elicit this testimony is immaterial—it instead confirms that the alleged exculpatory evidence was easily obtainable by other means. Thus, Appellant has failed to establish the second prong of Cheeseboro.

C. Cases from other jurisdictions cited by Appellant offer her no support and re otherwise distinguishable.

Appellant contends that adverse inference jury instructions, also referred to in Appellant's brief as a spoliation charge, have been deemed appropriate in other jurisdictions. While Appellant is correct that a small minority of other jurisdictions have allowed adverse inference jury instructions in criminal cases—yet only in rare situations—the cases she cites do not actually support her position and other otherwise distinguishable on their facts.

The first two cases Appellant cites, Cost v. State and United States v. Laurent, do not support her arguments because the courts refused to give the requested charge in those cases. (App. Br. at 11.) Cost involved the destruction of blood evidence cleaned out of a jail cell. Cost v. State,

10 A.3d 184, 188 (Md. 2010). The Maryland intermediate appellate court specifically held that a spoliation instruction was improper because "the term 'spoliation,' moreover, is often associated with egregious or bad faith actions, and not for cases involving negligent destruction or loss". Id. at 190. The court went on to explain that what was more appropriate in that particular case, was a "missing evidence" jury instruction. Id. A missing evidence instruction "would permit but not demand that the jury draw an inference that the missing evidence would be unfavorable to the State..." Id. at 197. Unlike the defendant in Cost, however, Appellant made no such request for a missing evidence instruction.

In also refusing to issue a spoliation instruction, the court in Laurent determined that routine erasing of videotape failed to satisfy the Youngblood standard. United States v. Laurent, 607 F.3d 895, 902 (2010) (citing Youngblood, 488 U.S. at 57–58 (1988)). Although the court recognized that the modern federal pattern jury instructions permitted the court to give a spoliation instruction in civil and criminal cases, id. at 902 (citing 4 L. Sand et al., *Modern Federal Jury Instructions* § 75.01 (instruction 75-7), the court concluded that a spoliation charge was *not* appropriate in that case, id. at 903. Relying on Youngblood, the Court reasoned that the "Supreme Court has distinguished between evidence that was apparently exculpatory before the evidence was destroyed, for which the failure to preserve is a due process violation even without bad faith, and evidence that was only 'potentially useful" for the defense, for which the defense must establish the government's bad faith to show a violation." Id. at 900 (citing Youngblood, 488 U.S. at 57–58). The court determined that the erased video footage was only "potentially useful" and "above all else an instruction must make sense in the context of the evidence, and no adverse-inference instruction would make sense here." Id. at 903. Appellant likewise fails to establish that the body worn camera footage from Officer Johnson is more than just potentially useful here.

Similar to Laurent, an adverse inference instruction does not make sense in this case when the inability to provide the camera footage was due to an upload error and not the intentional action of any individual.

Perhaps recognizing the shortcomings of Cost and Laurent, Appellant also cites State v. Richardson, to support her claim that a spoliation instruction is appropriate here. (App. Br. at 12.) Richardson, however, is distinguishable on its facts. State v. Richardson, 171 A.3d. 1270, 1272–73 (N.J. Super Ct. App. Div. 2017). There, in contrast to the two previous cases relied upon by Appellant, the appellate division of the New Jersey Superior Court did conclude that an adverse inference charge was appropriate, but only because Defendant specifically requested the police department preserve the video footage five days after Defendant's arrest. Id. at 1273. But despite this request well in advance of trial, the police department destroyed the footage. Id., at 1272–73. That situation is altogether different than this case, where the body worn footage was never uploaded at the time of arrest through no fault of the officer and in the absence of an advance demand for preservation of that specific evidence. While the Richardson court reasoned that an "adverse-inference charge is a remedy to balance the scales of justice," id. at 1277 (citing State v. Dabas, 71 A.3d 814 (N.J. 2013)), the scales of justice in this case were balanced. Neither party was responsible for the video footage failing to upload, and neither had the ability to use that footage at trial. That said, both parties had equal access to the questioning of Officer Johnson, the 911 calls, the crime scene photos, and witness Tammy Keiffer.

Although other jurisdictions may use adverse inference charges in limited circumstances, Appellant fails to establish that South Carolina should adopt those standards, or even that those standards would have been met in this case. Thus, the Court should affirm.

II. Even if appellant would have met the appropriate threshold to warrant an adverse inference jury instruction, the absence of one in this case was harmless error.

"If a review of the entire record does not establish that the error was harmless beyond a reasonable doubt, then the conviction shall be reversed". State v. Bowers, 436 S.C. 640, 646, 875 S.E.2d 608, 611 (2022) (citing State v. Simmons, 423 S.C. 552, 566, 816 S.E.2d 566, 574 (2018)). "Prejudicial error in a jury instruction is an error that contributed to the jury verdict". Id. (citing State v. Burdette, 427 S.C. 490, 496, 832 S.E.2d 575, 578 (2019)). Appellant has failed to establish that the lack of an adverse inference jury instruction contributed to the verdict in this case, and that the judge's refusal was both erroneous and prejudicial.

Appellant's main argument was that this case was about the credibility of Tammy Keiffer versus the credibility of Appellant. (App. Br. at 12.) On that point, the trial court instructed the jury that they "must judge the credibility, which simply means the believability of the witnesses, and the value or weight to be given to their testimony". (Trial Tr. March 16, 65:22-24; R. at __:__.) The court also instructed the jurors that they "may believe the testimony of a single witness against that of many witnesses, or the other way around". (Trial Tr. March 16, 65:22-24; R. at :__:__.) It even instructed the jury as to self-defense. ". (Trial Tr. March 16, 69:12-70:17; R. at __:__.) There jury saw photos of Tammy Keiffer's visible injuries, heard the 911 calls from both witnesses, and the jurors were able to assess the credibility of both women as they testified. The jurors are presumed to have followed these instructions. Yet the jury simply believed Tammy Keiffer's version of events over that of Appellant.

Similar to Breeze, Appellant was given wide latitude on cross examination of Officer Johnson when it came to the body worn camera footage that wasn't present in court. Breeze, S.C. at 547, 665 S.E.2d at 525. Appellant was not limited in any argument she made to the jury in closing about the body worn camera footage or what it may have shown. Appellant herself testified

that she did in fact drag Tammy Keiffer to the bedroom by her hair, but that she did so in self-defense. (Trial Tr. March 15, 158:17-159:4; R. at __:__.) The jury was instructed appropriately on each of these issues, but simply did not believe Appellant—that does not constitute reversable error.

III. Even if the failure to give the adverse inference jury instruction was not harmless error, the charge itself would be an unconstitutional comment on the facts of the case.

Even if somehow warranted by law enforcement's unintentional failure to upload the body worn camera footage, Appellant would not be entitled to a spoliation jury instruction. Such an instruction is tantamount of a prohibited charge on the facts. S.C. Const. Art. V, §21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."). In State v. Stukes, the trial court instructed the jury under Section 16-3-657 that "the testimony of the victim in a criminal sexual conduct prosecution need not be corroborated by other testimony or evidence" in addition to the general charge on credibility. State v. Stukes, 416 S.C. 493, 497, 787 S.E.2d 480, 482 (2016). The Supreme Court overturned Stukes's conviction, holding that the jury charge was "confusing and violative of the constitutional provision prohibiting courts from commenting to the jury on the facts of a case." Id. at 499, 787 S.E.2d at 482. "By addressing the veracity of a victim's testimony in its instructions, the trial court emphasizes the weight of that evidence in the eyes of the jury". Id.

Providing the adverse inference jury instruction in this case would also have been an impermissible comment on the facts of this case. A trial court can no more comment to the jury that the State destroyed evidence *and* that that evidence as favorable to the defense than it can comment on the corroboration of testimony from a victim. The trial court properly declined to give the adverse inference charge in light of South Carolina's constitutional prohibition on judges commenting on the facts of a case.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Jasper County
Honorable Robert J. Bonds, Circuit Court Judge
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The State, Respondent,

vs.

Leslie Keiffer Appellant.

PROOF OF SERVICE

I, Caroline Collins, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by sending an electronic copy via email to the address listed in AIS for the following individual:

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I further certify that all parties required by Rule to be served have been served.
This 23rd day of June, 2023.

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Attachments: KEIFFER Leslie - Initial Brief of Respondent and Designation of Matter - 2022-000360 (03317608xD2C78).PDF

Good Morning Ms. Shipe,

Attached please find the Initial Brief of Respondent and Designation of Matter in The State v. Leslie Keiffer (2022-000360). These documents will be submitted to the South Carolina Court of Appeals today via the AIS One Drive System.

If you will, please reply to confirm receipt of this email.

Thank you!

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