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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Jasper County

Honorable Robert J. Bonds, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LESLIE KEIFFER,

APPELLANT

APPELLATE CASE NO. 2022-000360

FINAL BRIEF OF APPELLANT

SARAH E. SHIPE
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in failing to instruct the jury that it may draw an adverse inference against the state where the video footage of the scene and of the interviews of both the complaining witness and appellant were destroyed because law enforcement failed to comply with their own policy regarding body worn camera video retention resulting in the loss of key evidence for trial where credibility was central in the case?

STATEMENT OF THE CASE

On May 5, 2021, a Jasper County grand jury indicted appellant for domestic violence, third degree. R. 282. On March 14, 2022, appellant's case was called to trial before the Honorable Robert Bonds and a jury. R. 1. Appellant was represented by Carolyn Carmody and the state was represented by assistant solicitor, Samantha Molina, and assistant solicitor, J.D. Williams. R. 1.

On March 16, 2022, the jury found appellant guilty as indicted. R. 265, ll. 3-7. Judge Bonds sentenced appellant to sixty days' imprisonment suspended upon the service of seven days. R. 273, ll. 18-22.

This appeal follows.

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

The trial court erred in failing to instruct the jury that it may draw an adverse inference against the state where the video footage of the scene and of the interviews of both the complaining witness and appellant were destroyed because law enforcement failed to comply with their own policy regarding body worn camera video retention resulting in the loss of key evidence for trial where credibility was central in the case.

Relevant facts

Appellant met Tammy Keiffer at a mutual friend's wedding in 2015. R. 68, l. 20-69, l. 2. They married the following year, in 2016. R. 69, ll. 3-9. Their relationship was a difficult one and they often separated for periods of time. R. 69, ll. 9-21; 98, l. 21-99, l. 1. In early 2020 the couple's difficulties became unmanageable, and they began calling law enforcement to intervene in their arguments. R. 134-36. Regarding this incident, both admit to having been drinking alcohol that day. However, they each accuse the other as having been the aggressor in the physical fight that occurred. Responding Officer, Lachlisha Johnson interviewed appellant and Tammy shortly after the incident.

Pretrial motions

Pretrial, Officer Johnson testified that, while she never received a copy of Jasper County Sheriff's Department's policy on body worn cameras,[1] she knew she was supposed to wear it and activate it when she was on a call. R. 6, ll. 11-14. Johnson agreed that the purpose behind using a body worn camera is to accurately document events. R. 6, l. 23-7, l. 8. Johnson testified that on the day of the incident she was wearing her body worn camera and it was recording. R. 7, ll. 12-20. She said that at the end of her shift she labeled the footage with the case number, put a

[1] Court's exhibit 1, body worn camera policy is on file with the Court.

description in, and docked the camera on its charging dock so that the video footage would download. R. 7, l. 21-8, l. 3. Johnson admitted that the video from that day was not in evidence and that she does not know what happened to it after she docked the camera. R. 8, ll. 6-14. Johnson acknowledged that the body worn camera video from that day no longer existed. R. 9, ll. 8-10.

Defense counsel moved to dismiss appellant's charge arguing that, because she was unable to obtain all of the evidence—the body worn camera video—in appellant's case she was not able to provide an effective defense. R. 10, l. 23-11, l. 21. The state argued dismissal was not the remedy. R. 11-13. The trial court denied defense counsel's motion to dismiss and said that while it was clear video from Johnson's body worn camera no longer existed and "[Johnson] maybe didn't follow their policy" dismissal was not the proper remedy. The court stated defense counsel could cross-examine Officer Johnson on this matter. R. 14, l. 6-16, l. 3.

After the court's ruling defense counsel requested that the court charge the jury on spoliation of evidence, specifically that when evidence is lost or destroyed by the party an inference may be drawn by the jury that the evidence which was lost or destroyed would have been adverse to that party. R. 16, ll. 6-15. The solicitor conceded they had no legal basis to argue the defense was not entitled to the charge although the "state certainly doesn't like it." R. 17, ll. 18-22. The court declined to rule at that time.

Testimony at trial

Tammy testified that on March 7, 2020, during an argument this time about "property" appellant "lunged" at her from across the bar in their kitchen. R. 63, ll. 4-11. Tammy closed herself in the bedroom in fear. R. 63, ll. 6-15. She contended that while in the bedroom she heard appellant "tearing the kitchen apart" with a hammer and she came out of the bedroom to

try to calm appellant. R. 63, l. 16-64, l. 4. Tammy said appellant threw an ashtray at her and then appellant choked her. R. 64, ll. 5-14. She testified she defended herself by grabbing appellant's hair to pull her off. R. 64, ll. 16-22. Tammy said that appellant dragged her to the bedroom and left the house. R. 64, l. 23-65, l. 2. After appellant left Tammy called 911. R. 65, ll. 3-4.

Appellant testified that they had a verbal "spat," and then Tammy left the room. R. 115, ll. 1-22. Later Tammy came back and, from behind, pulled appellant from her chair on to the ground and with her arm around appellant's neck began choking her. R. 116, l. 16-118, l. 11. In defense, appellant scratched at Tammy's arm and reached behind and scratched at her face and eyes to get Tammy to release her. R. 119, ll. 1-11; 121, ll. 6-20. Appellant was so scared that she soiled herself during the incident. R. 123, ll. 3-12. Appellant pulled Tammy into the bedroom, closed the door, left the home, and called 911. R. 128, l. 17-129, l. 13.

Officer Johnson testified that she responded to appellant and Tammy's home that day and spoke with Tammy. R. 27-28. Tammy told her that her wife had "attacked" her. R. 28, ll. 13-18. Johnson testified that she saw that Tammy had blood on her face, cuts on her forehead and nose, and a couple cuts on her hands. R. 32, ll. 7-10; 33, ll. 7-9. Johnson said Tammy had been "slapped around, knocked to the floor . . . [and] dragged into the bedroom." R. 33, ll. 23-25. Notably no medical attention was sought on Tammy's behalf. R. 50, ll. 18-24.

Johnson also spoke with appellant who was four miles away from the home. R. 35, ll. 3-14. Johnson testified that appellant was crying and appeared under the influence of alcohol when she saw her. R. 38, ll. 1-8. Appellant did not appear injured to Johnson but told her that Tammy had "placed her hands around her neck and started to strangle her." R. 39, ll. 1-12.

Johnson insisted that she had her body worn camera on the day of the incident and it was activated during her interviews of appellant and Tammy. R. 46-47. Johnson said that at the end of her shift she placed the body worn camera on the charger and it should have downloaded to the "system." R. 48, ll. 2-4. Johnson admitted that in preparation for trial she searched for the video, and it was not there. R. 48, l. 9-49, l. 4. Johnson stated that she did not receive training on the body worn camera. She testified that she was provided the equipment and shown how to use it and download the video to the system from the camera. R. 45, ll. 1-23. Johnson stated, once downloaded, the video is "preserved in evidence.com" and she had no control over the evidence after downloading it in the system that day. R. 46, ll. 3-9.

During the charge conference defense counsel's pretrial request for a charge on spoliation of evidence was discussed. R. 162-169. At that point the state had an objection to the jury being charged with spoliation of evidence. R. 162, l. 4. The state argued that an adverse inference charge was "not appropriate in this case," based on *State v. Breeze*,[2] and *State v. McBride*,[3] because the Court found in those cases that greater caution should be exercised by trial courts in permitting this instruction in criminal cases than in civil proceedings. R. 162, l. 5-163, l. 25. Defense counsel asserted that this case was distinct from *Breeze* and *McBride* because those were cases where the evidence had been tested and then lost and central to this case is the credibility of appellant and Tammy and the statements, they made at the time of the incident were vital to the case. R. 164-65.

The following day the court denied defense counsel's request to charge the jury regarding

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2 379 S.C. 538, 665 S.E.2d 249 (Ct. App. 2008).

3 416 S.C. 379, 786 S.E.2d 379 (Ct. App. 2016).

spoliation of evidence. R. 187, l. 15-190, l. 23. The court found *State v. Cheesboro*,[4] stood for the principle that the state does not have the absolute duty to safeguard potentially useful evidence that might vindicate a defendant. R. 187, ll. 15-22. The court found that appellant must show bad faith and that there was none shown in this case. R. 187, l. 24-188, l. 21. The court further found that defendant did not show that the body worn camera video was exculpatory. R. 188, ll. 22-25. The court went on to say that adverse instructions are rare and that this case did not warrant the charge. R. 189, l. 18-190, l. 21.

Discussion

The trial court erred in analyzing appellant's request for an adverse inference pursuant to *State v. Cheeseboro*, 346 S.C. 526, 552 S.E.2d 300 (2001). In *Cheeseboro*, the issue was not whether the judge should have instructed the jury on the spoliation of evidence. Instead, it was whether testimony regarding the destroyed evidence should have been suppressed or the charges dismissed because of the destruction of the evidence. *Id.* While dismissal of the charge was requested pretrial and denied in this case. Appellant's request for an adverse inference charge should not have been treated the same as their earlier motion to dismiss.

"The trial judge is required to charge only the current and correct law of South Carolina." *State v. Jenkins*, 408 S.C. 560, 569, 759 S.E.2d 759, 764 (Ct. App. 2014) (quoting *State v. Brown*, 362 S.C. 258, 261, 607 S.E.2d 93, 95 (Ct. App. 2004)).

Our Supreme Court has upheld a jury charge which advised that "when evidence is lost or destroyed by a party an inference may be drawn by the jury that the evidence which was lost or destroyed by that party would have been adverse to that party." *Kershaw County Bd. Of Educ. v. U.S. Gypsum Co.*, 302 S.C. 390, 394, 396 S.E.2d 369, 372 (1990). In *Stokes v. Spartanburg*

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4 346 S.C. 526, 552 S.E.2d 300 (2001).

Regional Medical Center, the following charge was requested:

> I charge you that when a party fails to preserve material evidence for trial, it is for you to determine whether the party has offered a satisfactory explanation for that failure. If you find the explanation unsatisfactory, you are permitted—but not required—to draw the inference that the evidence would have been unfavorable to the party's claim.

368 S.C. 515, 522, 629 S.E.2d 675, 679 (Ct. App. 2006).

This Court held "[w]e believe this language reflects the law of South Carolina and should have been charged based on the evidence presented in this case." *Id.* Additionally, this Court held the failure to charge was prejudicial to the appellant. *Id.*

While 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) (noting "adverse inference charge[s] based on missing evidence ... ha[ve] been limited to civil cases in South Carolina"). They are not prohibited in criminal cases.

In *State v. Breeze*, this Court held the state's inadvertent destruction of marijuana was harmless. 379 S.C. 538, 665 S.E.2d 247 (Ct. App. 2008). In that case Breeze was searched after running from a license check point and found to have marijuana. Before trial Breeze was informed that the marijuana had been destroyed. *Id.* at 541, 665 S.E.2d 249. This Court, relied on *State v. Simmons*, 267 S.C. 479, 482, 229 S.E.2d 597, 598 (1976) for the following holding: "Even greater caution should be exercised by the courts in permitting an adverse inference comment in criminal proceedings than in civil proceedings." Critically, in *Simmons*, it was the state who commented during closing argument on the failure of the appellant to produce his wife as a witness, "from which it is conceded he drew an adverse inference against appellant as to his guilt." 267 S.C. 479, 482, 229 S.E.2d 597, 598. The appellant did not testify nor did he

introduce any evidence. *Id.* Moreover, the appellant's wife was not a compellable witness. *Id.* Therefore, under those circumstances, our Supreme Court held "it was error for the trial judge to permit the adverse inference comment." *Id.*

The language quoted in *Breeze* was a cautionary warning against trampling on an appellant's rights, as seen by the Court's reference to a secondary source:

> The rule applicable to a party who fails to call witnesses exclusively in his control does not apply to a defendant who introduces no evidence at all . . .

29 AM. JUR. 2d Evidence, Section 180 at page 227.

In *State v. McBride*, this Court concluded that McBride was not entitled to an adverse inference charge. 416 S.C. 379, 389-90, 786 S.E.2d 435, 440 (Ct. App. 2016). In that case, law enforcement lost the complaining witness's shirt, which allegedly had some evidence on it to support or dispel the allegations. *Id.* McBride requested the court charge the jury that it may infer the lost evidence would be adverse to the state and the court denied the request. *Id.* This Court relied on *State v. Reeves*, in its conclusion that this charge was not warranted in *McBride*, stating:

> Adverse inference charges are rarely permitted in criminal cases. *See Reaves*, 414 S.C. at 128 n.5, 777 S.E.2d at 218 n.5 (noting "adverse inference charge[s] based on missing evidence ... ha[ve] been limited to civil cases in South Carolina"); *State v. Batson*, 261 S.C. 128, 138, 198 S.E.2d 517, 522 (1973) (entertaining "grave doubt as to the propriety, in a criminal case, of the rule of an adverse inference from the failure to produce a material witness"); id. (stating "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"). We find no error by the trial court in denying the request for the jury charge.

State v. McBride, 416 S.C. 379, 389–90, 786 S.E.2d 435, 440 (Ct. App. 2016).

Accordingly, while it may be infrequently warranted there is no absolute prohibition against charging the jury on an adverse inference, spoliation instruction, particularly when the charge is requested by defense counsel after the state failed to preserve crucial evidence. As defense counsel aptly argued, the evidence in *Breeze* was analyzed prior to its being destroyed. *Id.* at 547, 665 S.E.2d 248. The exculpatory video evidence in this case was apparently never seen.

Additionally, other jurisdictions allow spoliation instruction in criminal cases. *See Cost v. State*, 10 A.3d, 196-197, 381-82 (Md. 2010). *See also United States v. Laurent*, 607 F.3d 895, 902 (1st Cir. 2010); *State v. Willits*, 393 P.2d 274, 279 (Ariz. 1964); *State v. Ish*, 461 P.3d 774, 797-798 (Idaho 2020); *State v. Hartsfield*, 681 N.W.2d 626, 630-631 (Iowa 2004); *Washington v. State*, 478 So.2d 1028, 1032 (Miss. 1985). The Court of Appeals of Maryland explained "that an instruction which informs a jury that it may consider a particular inference runs the risk of creating the danger that the jury may give the inference undue weight ... [or of] overemphasizing just one of the many proper inferences that a jury may draw." *Cost*, 10 A.3d at 197. Nevertheless, the court held the instruction was necessary as it would aid the jury in clearly understanding the case, providing guidance to the jury, and help the jury arrive at the correct verdict. *Id.*

"A 'spoliation' instruction, allowing an adverse inference, is commonly appropriate in both civil and criminal cases where there is evidence from which a reasonable jury might conclude that evidence favorable to one side was destroyed by the other." *United States v. Laurent*, 607 F.3d 895, 902 (1st Cir. 2010); 4 L. Sand et al., Modern Federal Jury Instructions § 75.01 (instruction 75-7), at 75-16 to -18 (2010). The burden is upon the party seeking the instruction to establish such evidence. *Id.*; § 75.01, at 75-18; *United States v. Lopez-Lopez*, 282

F.3d 1, 18 (1st Cir. 2002) ("[A] defendant is not entitled to an instruction on a defense when the evidence in the record does not support that defense."), cert. denied, 536 U.S. 949, 122 S.Ct. 2642, 153 L.Ed.2d 821 (2002).

In *State v. Richardson*, the Superior Court of New Jersey reversed a possession of heroin conviction where the state failed to preserve booking room videotape, despite the defendant's request, where the evidence warranted an adverse inference instruction. 452 N.J. Super. 124, 132, 171 A.3d 1270, 1274 (App. Div. 2017). The opinion detailed officers' failure to preserve the recording:

> The arresting officer testified that he took no steps to preserve the recording. He claimed he only requested preservation of tapes to record incidents he did not see; therefore, there was no reason for him to request the tape's preservation. Yet, the sergeant testified officers could request the preservation of takes "for almost any reason," and often did. He added that officers typically requested videos of incidents they did observe, noting that officers preserved tapes to refresh their recollection at trial. As the arresting officer did not request the video, it was erased thirty days after defendant's arrest.

Id. at 130, 171 A.3d at 1273.

Here, appellant was prejudiced by denial of this instruction. This case turned on whether the jury believed Tammy's version of events or appellant's version of events. Video from Johnson's body worn camera was exculpatory because it would have disproven Tammy's version of events. The video from Johnson's body worn camera would have shown there was no evidence that appellant destroyed the house with a hammer. There were no photographs admitted of such destruction or testimony that a hammer was present at the scene. Nevertheless, Tammy alleged that there was a busted window as well as damage in the kitchen. It would have supported appellant's version of the incident. Additionally, the video from Johnson's body worn camera would have shown the demeanor of both parties directly after the incident, in this case

that turned on their credibility. Instead, the jury had to determine credibility based on the testimony of both parties, two years after the incident, and Johnson's recollection of events which she admitted came from her report that detailed the incident in a mere two paragraphs. R. 59, l. 18-60, l. 9.

The state destroyed video from Johnson's body worn camera that captured the scene and interviews of both appellant and Tammy directly after the incident. The court erred in failing to instruct the jury that it was permitted to draw an adverse inference based upon missing evidence.

CONCLUSION

Based on the foregoing argument, appellant respectfully requests this Court reverse his conviction and remand for a new trial.

Sarah E. Shipe
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of August, 2023.

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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final 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."

August 14, 2023.

Sarah E. Shipe
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
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APPELLATE CASE NO. 2022-000360

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Final Brief of Appellant in the above-referenced case has been served upon Kinli B. Abee, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 14th day of August, 2023.

Sarah E. Shipe
Appellate Defender

ATTORNEY FOR APPELLANT