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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Honorable Bentley Price, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CHANNON T. PRESTON,

APPELLANT

APPELLATE CASE NO. 2022-001474

INITIAL BRIEF OF APPELLANT

ROBERT M. DUDEK
Chief 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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2.

Whether the court erred by admitting Corey Singleton's statements about the crime, including body camera videos, State's Exhibits 3, 4, and 5, where Corey Singleton was being questioned about the crimes by law enforcement since Singleton's hearsay answers were incriminatory of appellant, and they denied appellant his right of confrontation, and cross-examination?

3.

Whether the court erred by admitting a video clip, State's Exhibit 158, and still shots from it depicting appellant in the presence of an assault weapon and "drug" money since this video was taken five days before the shooting in this case, it was not relevant, and any relevance this evidence had was outweighed by its unduly prejudicial effect?

STATEMENT OF THE CASE

Appellant was indicted at the November 2021 term of the Beaufort County grand jury for the offenses of murder, attempted murder, and possession of a weapon during the commission of a violent crime. R. p. *. His case was called for trial on October 10, 2022, before the Honorable Bentley Price and a jury. Appellant was represented by Ashley Cornwell. Mary Jones was the assistant solicitor. Tr. 1.

On October 12, 2022, the jury found appellant guilty on each of these charges. Tr. 621, l. 19 – Tr. 622, l. 5. Judge Price sentenced appellant to concurrent terms of thirty-seven years imprisonment. Tr. 627, ll. 11-24.

This appeal follows.

STANDARD OF REVIEW

Issues One and Two: **Hearsay and the Right to Confrontation:**

"The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (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. at 429–30, 632 S.E.2d at 848.

The Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." This procedural protection applies in both federal and state prosecutions by virtue of the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 406, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

Issue Three: **Relevance and the probative value of evidence being substantially outweighed by the danger undue prejudice**:

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rule 401, SCRE.

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE.

"In reviewing a trial court's ruling on the admissibility of evidence, appellate courts recognize that the trial judge has considerable latitude in this regard and will not disturb such rulings absent a prejudicial abuse of discretion. State v. Whitner, 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012); State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Whitner, 399 S.C. at 557, 732 S.E.2d at 866.

In order to admit evidence of bad acts not resulting in conviction, the trial court must, "[a]s a threshold matter, ... determine whether the proffered evidence is relevant." Clasby, 385 S.C. at 154, 682 S.E.2d at 895; "If the trial judge finds the evidence to be relevant, the judge must then determine whether the bad act evidence [is admissible under the terms] of Rule 404(b)" to show, *inter alia,* the existence of a common scheme or plan. Clasby, 385 S.C. at 154, 682 S.E.2d at 895. If the testimony is relevant and proffered for a permissible purpose, the trial court must next conduct a balancing test, pursuant to Rule 403; where the testimony's probative value is substantially outweighed by the danger of unfair prejudice, the trial court may exclude it. See State v. Gillian, 373 S.C. 601, 611, 646 S.E.2d 872, 877 (2007); see also Rule 403, SCRE ("[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice ...").

ARGUMENT

1.

The court erred by admitting the contents of the 9-1-1 call since the caller, Ms. Stewart, was being questioned about the crime by the 9-1-1 official and Stewart was systematically relaying the answers of Corey Singleton to this official since this was inadmissible hearsay evidence, and appellant was denied his Sixth Amendment right to confront and cross-examine Singleton.

Introduction

The state successfully convicted Appellant Channon Preston of murder and attempted murder through the hearsay statements of Corey Singleton, where appellant never had the opportunity to confront and cross-examine Singleton about the accuracy of the information he provided to the police about this crime. The state admitted, over repeated objections, what Singleton told his neighbor, Cynthia Stewart, about what allegedly happened during the shooting incident. Stewart then told the 9-1-1 operator, in response to her investigatory questions, what Singleton was telling her about the shooting. The state also admitted, over objection, other hearsay statements made by Singleton to the police which were incriminatory of appellant.

Defense counsel properly objected that the admission of this hearsay evidence violated appellant's Sixth constitutional right of Confrontation in derogation of Crawford v. Washington, 541 U.S. 36 (2004). In short, appellant was convicted because of the hearsay statements of Singleton it introduced into evidence where appellant never had a prior opportunity to confront and cross-examine Singleton.

Relevant Facts

Prior to trial, Defense counsel Cornwell moved to exclude the statements of an unavailable declarant, Corey Singleton, as well as to suppress or exclude some hearsay "video clips" of Singleton giving the police "information" about the crime which was inculpatory of appellant. Tr. 63, ll. 3-7.

Counsel Cornwell explained that Cynthia Stewart called 9-1-1 and relayed to the 9-1-1 operator what Singleton told her as Singleton stood on her porch. Allegedly, Singleton told Stewart "I think I may have been shot, can I come in? Or something to that effect." Ms. Stewart would not let Singleton into her house but she did call 9-1-1 to let 9-1-1 know what was going on." Cornwell told the judge that the 9-1-1 operator "asked several questions regarding what happened, the identity, and any identifying characteristics of the people involved." Tr. 64, l. 1 – Tr. 65, l. 4:

> That third party, Miss Stewart, would relay questions from the 911 operator to Mr. Singleton who was outside her home, and then relay the information back to the 911 operator.
>
> Once law enforcement arrived at the location, they met with Mr. Singleton. They got a statement from him at that time. He also indicated that he had a Blink surveillance camera system that may have a video and he needed to get his phone to show him. He did give them one, like a five-second clip of a video that he showed them at that time.
>
> Law enforcement then asked him to come to the police station to give a formal statement. At that time, he declined and asked for his attorney to be present. Once his attorney was able to meet with him, they did go and meet with law enforcement and give statements. They also provided three or four additional clips of video surveillance, however none of those clips show the actual shooting.

Tr. 64, l. 1 – Tr. 65, l. 4.

Cornwell also noted that there were several follow-up interviews with Singleton by law enforcement. However, Singleton died of a drug overdose months before the trial. Therefore, it would be a violation to the appellant's right to confrontation pursuant to Crawford v. Washington, 541 U.S. 36 (2004), to admit Singleton's statements since they were testimonial in nature. "And based on that, that there's no availability for cross-examination, we do not believe that those statements should be able to come in in any way." Tr. 65, l. 11 – Tr. 66, l. 15. Defense counsel also cited our Supreme Court's opinion in State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017) where our Supreme Court reversed, in part, where a police officer testified while canvasing the neighborhood where the victim was shot, that two people told her that multiple shots had been fired since this was inadmissible hearsay evidence. [1]Tr. 66, l. 16 – Tr. 68, l. 6. Cornwell added that courts had cautioned prosecutors against using investigative information to circumvent the rules against hearsay. Tr. 68, l. 7 – Tr. 69, l. 24.

Defense counsel also noted that appellant never had the opportunity to confront and cross-examine Singleton, there was no ability to cross-examine Singleton at this time, and since this hearsay evidence was testimonial in nature, if admitted, it would violate appellant's rights under the Confrontation Clause. These statements were not excited utterances or present sense impressions and they should not be admitted. Tr. 69, l. 2 – Tr. 75, l. 2.

As to the video clips of appellant in the presence of an assault rifle, counsel also objected, *inter alia,* under Rule 403, SCRE. Counsel again noted as to the 9-1-1 call, that Cynthia Stewart was simply relaying information from a third party, Corey Singleton, where Singleton's statements were being offered for the truth of the matter asserted. The 9-1-1 operator was asking questions for investigative purposes. It was double hearsay by way of Singleton to Stewart to the

[1] The more than one shot hearsay evidence was prejudicial because it conflicted with King's account of the "accidental one shot" shooting.

911 operator and it could not be admitted without violating appellant's rights under the Confrontation Clause. Tr. 75, l. 3 – Tr. 81, l. 24.

The judge then asked defense counsel Cornwell if the defense planned to put a mere presence defense or a self-defense case. Cornwell responded that the defense first needed a ruling on its motion to exclude Singleton's statements before proceeding since the state did not have a case without Singleton's hearsay statements and accusations. Tr. 81, l. 25 – Tr. 83, l. 5.

The solicitor then claimed that Singleton's statements were admissible as excited utterances. Tr. 83, l. 8 – Tr. 95, l. 1. As stated, Defense counsel responded that the statements contained in the 9-1-1 call were double hearsay because Stewart was relaying information given to her by Singleton where the questions from the 9-1-1 operator were investigatory in nature. As will be seen *infra*, this was an accurate and fair characterization of the repeated questions of the 9-1-1 operator which went far beyond wanting the location, and nature of the incident, any suspected injuries involved. Tr. 95, l .21 – Tr. 102, l. 24.

The judge ruled that he would admit the contents of the 9-1-1 call as an excited utterance or a present sense impression. Tr. 108, ll. 2-8. The judge also ruled that other statements given to police officers by Singleton could also be admitted. Tr. 108, ll. 21-24. The judge concluded "and all other objections will be noted for the record." Tr. 108, l. 25 – Tr. 109, l. 25.

Defense counsel then asked the judge for clarification as to his rulings on the admission of Singleton's statements. Counsel repeated that Singleton's statements were testimonial in nature, that investigative hearsay was improper, and that these statements violated the holdings of Crawford v. Washington and our Supreme Court's holding in State v. King. Tr. 110, l. 1 – Tr. 111, l. 5.

Defense counsel added that the judge's ruling would allow Singleton to "make excited utterances over and over and over again" starting with the 9-1-1 call, and then during his subsequent statements to the police. Tr. 111, l. 19 – Tr. 112, l. 17. As will be seen infra, local law enforcement knew Singleton and it was apparent he had been the subject of prior police investigations, possibly Singleton even being a suspect in a murder. Defense counsel Cornwell stressed that Singleton had reason to mislead the police in this case, and this made the right of confrontation and cross-examination of Singleton all the more critical.

Jury in

Allyson Moreira was the 9-1-1 operator for the Beaufort County sheriff's department. Tr. 130, l. 10 – Tr. 131, l. 4. When the prosecution moved to admit the 9-1-1 recording, defense counsel again objected pursuant to Crawford v. Washington. The 9-1-1 tape was admitted over objection Tr. 130, ll. 3-25. That 9-1-1 call, State's Exhibit 1 was then played in its entirety to the jury and is on file for this Court's review.

In the 9-1-1 call, Cynthia Stewart relayed to the 911 operator each answer Singleton gave her to each question the 911 operator asked about the crime. Singleton told Stewart that Singleton said that a white Nissan Van was the vehicle from which the shots were fired. The vehicle was likely going towards Beaufort. Later in the call Stewart said Singleton offered that he thought it was a "white Toyota Van," not a Nissan van as originally stated. The 9-1-1 operator asked if Singleton knew the driver of this van. Singleton told Stewart that "Glizzy" was the driver, and she relayed that information to the 9-1-1 operator. Glizzy was appellant's nickname. There was one other person in the van with Glizzy according to Singleton. Other information elicited from this double hearsay 9-1-1 call was that Steven Glover was shot in Singleton's front yard. It was assumed that Glover was dead. Stewart said several times as the

9-1-1 interview call progressed that Singleton was "fine," after she was initially more concerned at the beginning of the 9-1-1 call because Singleton said initially he thought he had been shot but he had no visible wounds. See State's Exhibit 1 on file with this Court.

As will be seen *infra*, law enforcement, when hearing of the identifying information from this 911 call thought that appellant was involved in the shooting. Investigator Duncan later testified: "As I explained yesterday, my partner and I, we went over to *** Eddings Road to Mr. Preston's house, "knowing that name [Glizzy] and the van that came over the radio." Tr. 470, l. 6 – 471, l. 25. The solicitor argued that to the jury after playing the 911 tape again for the jury: "So who is Glizzy. Who is this mysterious man named Glizzy. Glizzy is Channon Preston . . ." Law enforcement knew Glizzy was appellant. Tr. 570, ll. 16-20

Cynthia Stewart then testified that she lived on Fripp Point Road on St. Helena Island. Tr. 133, ll. 2-7. Corey Singleton was her neighbor. Tr. 133, ll. 10-11. Stewart said that she learned from Singleton's mother that "he passed away". Tr. 133, l. 16 – Tr. 134, l. 3.

Stewart testified that on November 18, 2020, Singleton came to her house and "we heard a knock on the door. It was kind of a frantic knock. I said, who is it, and I could hear someone saying…" Defense counsel Cornwell objected again on the grounds of hearsay at this point. Stewart then said Singleton appeared to be "devasted". Stewart called 9-1-1 and Singleton stayed on her porch until the police arrived. Then Singleton left and spoke with the police. However, Stewart added that Singleton left his gun on her porch after he left and she did not leave her house until the police came and got the gun that Singleton had left behind. Tr. 135, l. 16 – Tr. 136, l. 1.

On cross-examination, Stewart said that she did not hear any gunshots prior to Singleton knocking on her door that day. However, Stewart explained that her remarks about being afraid

"something was going to happen" in the area was based on the fact that she often heard gun shots being fired from the residence where Singleton lived, and not anything that happened that day. Tr. 136, ll. 7-24.

Marvin Stewart, Cynthia's husband, then testified over objection that Singleton was upset when he came to their house on the day of the shooting. Singleton had a gun in his hand, and Marvin told Singleton to put the gun down. Contrary to his wife's testimony, Marvin testified that about twenty minutes before Singleton came to their house, he had heard gunshots. He did not call 9-1-1 because hearing gunshots was not unusual. Tr. 139, l. 14 – Tr. 141, l. 23.

On cross-examination, Marvin repeated that he heard more than five gun shots about twenty minutes before Singleton came to their house. Tr. 142, l. 4 – Tr. 143, l. 16.

Again, Defense counsel Cornwell asserted the defense belief that Singleton was involved in the overall crime, and that he was misleading the police or not disclosing relevant information to them to protect himself. Not only was appellant's right to confront and cross-examine the critical witness against him being denied, but he was also being prevented the right to present a complete defense given the trial judge's evidentiary rulings. The hearsay statements of Singleton were being heard by the jury where appellant had never had the opportunity to confront and cross-examine him. Tr. 161, l. 23 – 175, l. 10.

Discussion

Cynthia Stewart relaying the answers of Corey Singleton to the 9-1-1 operator where the 9-1-1 operator was asking continuous investigatory questions was improper because this was inadmissible hearsay, it was testimonial in nature, and it violated the Supreme Court's holding in Crawford v. Washington 541 U.S. 36 (2004).

In Crawford v. Washington, the Supreme Court held that out-of-court statements made by witnesses that were testimonial in nature were barred, under the confrontation clause, unless the witnesses were unavailable **and** the defendant had a prior opportunity to cross-examine the witnesses, regardless of whether the statements were deemed reliable by the court. Crawford v. Washington abrogated Ohio v. Roberts 448 U.S. 56 (1980).

The Court in Crawford v. Washington noted that the Sixth Amendment's confrontation clause provided that "[i]n all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him." Crawford v. Washington 541 U.S. 36, 42 *citing* Pointer v. Texas 380 U.S. 400, 406 (1965). The Court wrote that the right of confrontation, to confront ones accusers, was a concept that dated back to Roman times. Crawford v. Washington 541 U.S. at 43 *citing* Coy v. Iowa 487 U.S. 1012, 1015 (1988).

In Davis v. Washington, 547 U.S. 813 (2006), the Supreme Court held that the victim's identification of her abuser in response to initial questions from a 9-1-1 emergency operator was not testimonial in nature. However, where police responded to a domestic disturbance, found the wife and husband at home, and took a statement from the wife about the husband's abuse (in his absence), the statements from the wife were testimonial in nature:

> Statements that are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past evidence potentially relevant to later criminal prosecutions.

Davis v. Washington 547 U.S. 813, 822 (2006).

The Court in Davis v. Washington also noted "[I]f 9-1-1 operators are not themselves law enforcement officers, they may at least be agents of law enforcement when they conduct interrogations of 9-1-1 callers. "[F]or purposes of this opinion and without deciding the point, we consider their acts to be the acts of the police. As in Crawford v. Washington 541 U.S. 36 (2004) therefore, our holding makes it unnecessary to consider whether and when statements made to someone other than the law enforcement personnel are `testimonial.'" See Davis v. Washington 547 U.S. 813, 842, n, 2 (2006).

Here, Cynthia Stewart was relaying to the 9-1-1 operator in response to her repeated questioning about the crime what Corey Singleton was telling her how to answer the 911 operator. Cynthia Stewart's statements were hearsay because they were statements, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted. See 801(c), SCRE. This hearsay testimony, which also violated appellant's right to confront and cross-examine Singleton, was extraordinarily prejudicial since it unquestionably linked appellant to the crime in the minds of law enforcement. Appellant should be granted a new trial.

2.

The court erred by admitting Corey Singleton's statements about the crime, including body camera videos, State's Exhibits 3, 4, and 5, where Corey Singleton was being questioned about the crimes by law enforcement since Singleton's hearsay answers were incriminatory of appellant, and they denied appellant his right of confrontation, and to cross-examine a key adverse witness against him.

Relevant Facts

Beaufort County Sheriff's Deputy Joseph Driscoll was working on November 18, 2020, and he responded to a shots fired call. He met Cynthia and Marvin Stewart and Corey Singleton there. Tr. 145, ll. 5-23.

Driscoll confirmed that he spoke with Corey Singleton that day after the shooting, and that the conversation was recorded on his body camera. When the state went to introduce State's Exhibit #3, the DVD with the recording from the body camera, defense counsel again objected that this was hearsay, it violated the holding of Crawford v. Washington, and appellant's Sixth Amendment right to confrontation. The judge overruled the objection again. Tr. 148, l. 10 – Tr. 149, l. 7.

On this tape from the body camera, Singleton tells Driscoll about a white Toyota van with two black males inside being responsible for the shooting. The state also introduced, over objection, the body camera interview videotapes of Deputy Korey Ahrens and Deputy Brian Abell. Tr. 159, l. 14 – Tr. 160, l. 11. These body camera videos, State's Exhibit #3, State's Exhibit #4, and State's Exhibit #5 are on file with this Court for review.

On State's Exhibit #3, Singleton claims that the perpetrators were driving a white Toyota van. The perpetrators were black males. Singleton maintained that he was in the house when the white van approached, and his cousin, the decedent was sitting in his car outside. The same van pulled up again and began shooting. Driscoll then spoke into his microphone that the vehicle involved was a white Toyota van occupied by two black males. See State's Exhibit #3 on file with this Court.

On State's Exhibit #4, another body camera interview, Singleton confirms to Deputy Ahrens that he is not hurt "in any way." Singleton tells Ahrens that he recognized the perpetrator's face. He said that he knew the perpetrator because the perpetrator "sold weed and stuff." He was a small man "with dreads." He drove a white Toyota van. Singleton estimated that the perpetrator was only about twenty years old. While Singleton did not look injured in any way on the body camera, he agreed to allow EMS to check his "vitals." See State's Exhibit #4 on file with this Court.

In addition, Singleton told Deputy Ahrens that the perpetrator in the white van told him that the last time they sold marijuana in the area that they got "pulled" over by the police. Thus, Singleton claimed, because the driver of the Toyota van knew the police were at the top of the hill, he briefly left in his van but he "came right back." Singleton maintained that the decedent blew the horn from his car "like he was about to leave" so Singleton came back outside the house. Singleton offered that the perpetrators then "just opened up" and he fell to the ground. Singleton got up and "ran around the house" after hearing the gunshots. One of perpetrators said: "Get him, make sure you get him" as Singleton ran away. Singleton said that he could identify the perpetrator "if he saw him again." See State's Exhibit 4 on file with this Court.

On the Deputy Abell body cam, Singleton said two men pulled up in a white Toyota van. He did not know their names. Singleton would know, or could identify them, if he saw them again because they sold "weed." See State's Exhibit 5 on file with this Court.

Discussion

Singleton's identifying information given to the police regarding the perpetrators of the shooting being in a white Toyota van and Singleton knowing them from selling marijuana in the past was very incriminating. Singleton was no stranger in dealing with the police. Defense counsel had Deputy Abell admit that Singleton prior contact with law enforcement. Tr. 161, l. 23 – Tr. 162, l. 4. The solicitor objected when counsel asked Abell to admit he knew Singleton had been a suspect in a prior murder investigation. Tr. 162, ll. 3-5.

Defense counsel complained that *if* she had been able to confront and cross-examine Singleton, she would have been able to show Singleton's bias, his motive to lie and to be untruthful with police given his own criminal wrongdoing. Tr. 163, l. 8 – Tr. 167, l. 20. Defense counsel maintained that Singleton was involved in this murder and she was being denied the right to present a complete defense for appellant. Tr. 165, ll. 5-20. Singleton continuing to talk to police officers did not qualify his statements as excited utterance or present sense impressions. Singleton's prior problems with police gave him motive to lie about what happened in this case. The judge seemingly reasoned that since Singleton had died, even though the defense never had a prior opportunity to confront and cross-examine him, that the situation at trial with Singleton's claims coming in through other witnesses could not be avoided. Tr. 162, l. 18 - Tr. 170, l. 21. Appellant, the only one on trial, was also the only one deprived of his constitutional rights given what occurred in this case.

Deputy Abell then told the judge outside the presence of the jury that he had spoken with Singleton a couple of times in the past and that Singleton was "very stern, maybe a little aggressive. And he would pretty much every time, within a few seconds, [say] I want my lawyer. But him being [in the past], I'm not going to talk to you, and then him actually talking to us is what I mean by he was very different that day." Tr. 170, l. 22 – Tr. 171, l. 24.

The information taken from Singleton by the police was for the purpose of solving a murder. It was for investigative purposes to be later used to prove the perpetrator guilty of murder. Appellant was denied his right to confront and cross-examine Singleton as guaranteed by the Sixth Amendment to the United States Constitution as articulated in Crawford v. Washington. Singleton was "no stranger" to law enforcement as the trial judge even observed. However, admitting all of the investigatory body camera evidence and Singleton's statements to the police where Singleton could not be confronted and cross-examined violated appellant's Constitutional right to confrontation.

3.

The court erred by admitting a video clip, State's Exhibit 158, and still shots from it depicting appellant in the presence of an assault weapon and "drug" money since this video was taken five days before the shooting in this case, it was not relevant, and any relevance this evidence had was outweighed by its unduly prejudicial effect.

Relevant Facts

Master Sargent Adam Draisen also testified that Singleton had "had involvements" with the police in the past. Tr. 269, ll. 13-16. Draisen said that he did not investigate Corey Singleton or any involvement he may have had with this shooting. Draisen said Investigator Todd Duncan was the lead investigator. Tr. 271, ll. 8-13.

During the testimony of Investigator Duncan, the state admitted, over objection, State's Exhibit #158 (and State's Exhibit #184 and #185 which were still shots from the video) which reportedly showed appellant and Xaiver Polite in the presence of a "draco weapon" while smoking – apparently – marijuana. Polite was still in his IHOP uniform. There was money – which the state referred to as "drug money" between appellant's legs. The video in this case involving the gun and the money -- and therefore the still shots that came from it -- was filmed five days before the shooting in this case.[2] Defense counsel had argued that the video was not relevant: "It had nothing to do with this incident at all. So I believe that that is more prejudicial

[2] Duncan testified that he interviewed appellant for about an hour and a half. Duncan said the police had appellant's name from the 911 call after the shooting. Duncan offered that he tried to give appellant "excuses" for the shooting occurring such as "Did Corey [Singleton] pull a gun out?" Appellant never admitted participating in the shooting and he received a "mere presence" instruction. 561, l. 23 – 562, l. 13. Duncan testified appellant did not claim that he shot in self-defense, and "[h]e just said there were too many guns at once. Shit went sideways." Tr. 436, l. 1 – 437, l. 24.

than probative." Tr. 386, l. 16 – 390, l. 22. The judge ruled this video taken five days before the shooting was "extremely probative and nowhere near prejudicial enough to exclude the evidence of the guns five days prior." The judge noted the "drum magazine" on the gun which "[g]oes back to the `20 early and `30's gangster movies, is essentially what it looks it." The judge also observed that appellant' nickname of Glizzy came from the fact he always carried a 9 millimeter gun. Tr. 388, l. 21 – 390, l. 22.

Discussion

This video, State's Exhibit 158, and the slides taken from it, were not relevant, and any relevance they had was outweighed by their unduly prejudicial effect. It was obvious this video was meant to place appellant in a very bad light in the minds of the jurors as a gangster type. The judge acknowledged that fact.

In State v. King 422 S.C. 47, 810 S.E.2d 18 (2017), our Supreme Court held that the judge abused his discretion in admitting King's phone calls that he made from the detention center while incarcerated. King argued the probative value of these jail call recordings was outweighed by the danger of unfair prejudice given that they were profanity laced conversations and contained inferences that King had been charged with similar crimes.

The Supreme Court found that the very limited probative value of these jail call recordings was outweighed by their unfair prejudice to King. The Court noted that the fifteen minute recording was riddled with profanity, racial slurs, and impermissible references to King's prior bad acts. The Court cited State v. Cheeseboro 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001), which held evidence is unduly prejudicial if it has an undue tendency to suggest a decision on an improper basis. See State v. King 422 S.C. 47, 69, 810 S.E.2d 18, 29-30 (2017).

The decision on an improper basis in this case was that appellant would be viewed by the jury as a gangster, and a drug dealer. In short, he was a person of bad character. He needed to be convicted to protect the public.

Further, the videotape, State's Exhibit 158, was taken five days before the shooting in this case shows it was not relevant to prove intent or state of mind. Rule 401, SCRE states that, "`Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." See State v. Middleton, 441 S.C. 55, 893 S.E.2d 279 (2023) (Detective's testimony that the defendant avoided her and missed appointments was not relevant to show the defendant's consciousness of guilt nor was it relevant to explain the process and direction of the investigation).

In State v. Douglas, 302 S.C. 508, 397 S.E.2d 98 (1990), our Supreme Court held that evidence Douglas pulled a gun while horse playing the night before the murder did not establish his state of mind the next day. As in Douglas, the evidence was not probative of intent. The horse play or gangster playing silliness here occurred five days before rather than the night before as in Douglas. It also did not show motive, the absence of mistake or accident, common scheme or plan, or identity. See State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923).

There was no connection between the extraneous bad acts of driving around with an assault rifle, smoking marijuana, and displaying money and the shooting five days later this case. See State v Gore, 283 S.C. 118, 322 S.E.2d 12 (1984). The video recording, State's Exhibit #158, and the still photographs taken from it, were inadmissible and prejudicial. The judge erred by admitting these exhibits, and appellant should be granted a new trial.

CONCLUSION

By reason of the foregoing arguments, appellant's conviction should be reversed and this case remanded to the Beaufort County Court of General Sessions for a new trial.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of November, 2023.