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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RAHEEM OQUENDAL GRANT,

APPELLANT

APPELLATE CASE NO. 2023-000418

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

STATEMENT OF ISSUE ON APPEAL

Did the trial judge abuse her discretion by admitting a portion of a recorded telephone call between Appellant and his sister while Appellant was incarcerated pretrial where the evidence was not relevant since it did not impeach or contradict Appellant's testimony, and where any probative value of the evidence was substantially outweighed by the danger of unfair prejudice pursuant to Rule 403, SCRE?

STATEMENT OF THE CASE

A Charleston County grand jury indicted Appellant on March 2, 2020 for carjacking and first degree assault and battery. R. *. His case was called to trial on February 27, 2023 before the Honorable Deadra L. Jefferson, and a jury. Tr. 1. Assistant Solicitors Mariana Outten and Stephanie Linder represented the state. Benjamin Mack and Karla Martinez represented Appellant. Tr. 1.

On March 2, 2023, the jury acquitted Appellant of assault and battery, but found him guilty of carjacking. Tr. 648, ll. 6-13. He was sentenced to six years imprisonment. Tr. 665, ll. 7-11.

This appeal follows.

STANDARD OF REVIEW

"In criminal cases, this Court sits to review errors of law only and is bound by factual findings of the trial court unless an abuse of discretion is shown." State v. King, 422 S.C. 47, 54, 810 S.E.2d 18, 22 (2017) (quoting State v. Laney, 367 S.C. 639, 643, 627 S.E.2d 726, 729 (2006)) (internal quotation marks omitted). "An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law." Id. (citing State v. Black, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012)).

ARGUMENT

The trial judge abused her discretion by admitting a portion of a recorded telephone call between Appellant and his sister while Appellant was incarcerated pretrial where the evidence was not relevant since it did not impeach or contradict Appellant's testimony, and where any probative value of the evidence was substantially outweighed by the danger of unfair prejudice pursuant to Rule 403, SCRE.

Relevant Facts

In December 2019, Appellant had recently separated from his long term "significant other." It was a "temporary breakup." Tr. 427, ll. 17-19. During this time, Appellant met a woman named Tutu at the "corner store" near his home. Tr. 434, ll. 7-11; Tr. 444, ll. 12-21. Appellant had only known Tutu for about two weeks and did not know her real name. Tr. 428, ll. 14-17.

On Saturday, December 7, 2019, Appellant and Tutu went to the Holiday Festival of Lights at James Island County Park. The Festival of Lights is an annual event hosted by Charleston County Parks every mid-November through the end of December. On any given Saturday night, there are up to a thousand people at the festival. Tr. 321, ll. 6-9. The only way to access the festival is through the front gate of the park and vehicles line up for miles waiting to enter. Tr. 175, ll. 8-10; Tr. 318, ll. 2-9. To control traffic and manage the large crowd, Charleston County Parks employs seven deputies from the sheriff's office each night. Tr. 320, ll. 12-21. In addition to the deputies, thirty park employees are present to run the festival. Tr. 321, ll. 10-14.

After driving through the light show, visitors may park in one of three parking lots and participate in numerous holiday activities. The three parking lots are labeled lot A, which can hold roughly 150 cars; lot B, which can hold 170 cars; and lot C, which can hold "upwards of

200" cars. Tr. 32, l. 22 – 321, l. 5. It is "very common" for visitors to have difficulty finding their car at the conclusion of their visit. People often forget which parking lot they parked in and ask for assistance from park employees. Tr. 323, l. 20 – 324, l. 2.

That night, Tutu drove Appellant to the festival in her rental car. Before going to the festival, the pair stopped at a liquor store and bought Tequila. Tr. 435, ll. 8-11. When they arrived, they entered through the front gate of the park and paid the admission fee. Appellant testified that there were a lot of officers, people, and traffic at the entrance. After they drove through the light show, Tutu parked the car in parking lot B. Tr. 429, ll. 1-11; Tr. 436, ll. 2-7; Tr. 459, ll. 3-9. Appellant and Tutu then walked around for a while and continued to enjoy the lights. Tr. 430, ll. 1-5.

When it was time to leave, the two agreed that Appellant would drive home. They had both been drinking and since Appellant was "less intoxicated," he offered to drive. Tr. 445, l. 18 – 446, l. 8. As they approached what Appellant believed to be Tutu's car, Appellant saw the taillights flash and thought Tutu had used her key fob to unlock the doors. Tr. 430, ll. 6-14. Appellant walked up to the car, opened the door, and sat down in the driver's seat. Tr. 431, ll. 20-22. As he went to push the button to start the car, Appellant was struck by a man sitting in the backseat.

Appellant later discovered that he had mistakenly entered the wrong car. The car he entered was a dark brown 2013 Kia Optima owned by April Ross, not Tutu's dark silver Kia sedan. Tr. 178, ll. 2-13. April's boyfriend, Jorge Fuentes, was sitting in the backseat changing their baby's diaper when Appellant entered the car.[1] April was standing near the trunk of the vehicle with her eleven year old daughter. Tr. 174, l. 21 – 175, l. 17.

[1] Jorge Fuentes died in a car accident after this event but before Appellant's trial. Consequently, he did not testify and his recorded statement was not admitted as evidence. Tr. 174, ll. 10-13.

Upon entering the vehicle, Appellant told Jorge that he thought it was his car, but Jorge continued to strike Appellant. Eventually, Jorge and another man pulled Appellant from the vehicle. Tr. 116, l. 6 – 117, l. 2. Jorge then proceeded to beat Appellant until he was unconscious. Tr. 120, ll. 2-5; Tr. 129, ll. 9-17; Tr. 418, ll. 16-20. Jorge slammed Appellant against a truck, stomped on Appellant, and repeatedly kicked him while he was on the ground until a bystander, Ashley Vander-Ploeg, told Jorge to stop. Tr. 117, l. 13 – 119, l. 4. Vander-Ploeg eventually called 911. Tr. 113, l. 10-11.

On the other hand, April Ross, the owner of the car, claimed Appellant ran passed her while she was unfolding her baby's stroller near the back of her car, jumped into the driver's seat, and closed the door behind him. Appellant then locked the doors. April testified that she knocked on the window and said, "I'm sorry, but I think you got in the wrong car." She claimed Appellant looked at her, snickered, and said, "This is my car now." Tr. 176, l. 1 – 177, l. 8. According to April, Appellant then started the car and placed it in reverse. Tr. 177, ll. 9-18. Jorge, who was sitting in the back seat, reached over their baby's car seat to try to turn the car off. April claimed that she saw Appellant punch Jorge in the face and then there was a struggle inside the car.[2] Tr. 181, ll. 5-20.

April started yelling for help. She testified that she tried to unlock the doors with the key fob she had on her person, but for whatever reason the doors would not unlock. April then removed the "manual key" from inside the key fob, stuck it in the door lock, and used it to unlock the door. Tr. 178, l. 1 – 179, l. 20. Once the door was open, a man who was at the festival with his family and heard the commotion, approached and pulled Appellant out of the

[2] April was impeached with the recorded statement she gave law enforcement on the night of the incident. Despite her testimony that she saw Appellant strike Jorge, April told Detective Michael Galka that she could not see anything inside the car during the encounter. April also told the officer that Appellant said, "This is my car." However, she testified that Appellant said, "This is my car *now*." Tr. 189, l. 20 – 196, l. 6; Tr. 199, l. 11 – 206, l. 2 (emphasis added).

vehicle. This man, who was never identified, left as soon as Appellant was out of the car. Tr. 179, l. 15 – 180, l. 2; Tr. 182, ll. 14-17. Jorge walked around the back of the car and, as described, proceeded to beat Appellant until he was unconscious. Tr. 182, l. 20 – 183, l. 1; Tr. 418, ll. 16-20. Appellant suffered a broken nose and numerous lacerations all over his head and face. Tr. 432, ll. 16-19.

Appellant denied punching or threatening Jorge while Jorge was in the back seat. He also denied starting the vehicle. Appellant explained that while he did reach to start the car, Jorge punched him before he was able. He also told Jorge that he thought it was his car, but Jorge continued to strike him and he was forcibly pulled from the car by Jorge and another man. Appellant maintained it was "two on zero" because he was not fighting back. He "was not doing anything." Tr. 432, l. 3 – 433, l. 21.

Afterwards, Appellant did not know what happened to Tutu. He knew she was a few feet from him when he got into the vehicle. He suspected she saw what happened and was either embarrassed or did not want to be involved with law enforcement so she left. Tr. 431, ll. 2-13. A bystander saw a similar Kia sedan leaving the scene shortly after the encounter and Appellant believed this was Tutu. Tr. 115, l. 17 – 116, l. 3; Tr. 431, ll. 10-12.

Appellant testified that he was unable to contact Tutu afterwards because he did not have her contact information. During the short period of time that he knew her, Appellant had communicated with Tutu by phone. While Tutu's number was saved as a contact in Appellant's phone, he, not unexpectedly, had not memorized her number. Tr. 431, ll. 14-17; Tr. 445, ll. 3-7. Appellant explained that he had left his phone in Tutu's car while they were walking around the festival because the battery was dying. Tr. 430, ll. 15-23. Consequently, he could not call Tutu afterwards to "clear it all up" because he no longer had his phone in which her number was

saved. Additionally, Appellant had only known Tutu for two weeks and they had no friends in common. Tr. 431, ll. 14-17.

On cross-examination, the assistant solicitor asked Appellant if he had a friend named Tony. Appellant said he did not. The solicitor then asked Appellant if his friend Tony had his phone after this event. Appellant said he could not recall. Tr. 462, ll. 1-12.

The defense rested after presenting Appellant's testimony. Tr. 463, l. 23. The assistant solicitor indicated that she wished to call "the jail call records custodian" in rebuttal to admit a recorded phone call between Appellant and his sister in which Appellant allegedly talked about how his friend Tony had his phone and wallet "from that night." The solicitor explained that this call was the first call Appellant made after he was arrested on these charges. The call took place on December 13, 2019 at 8:01 p.m. The solicitor told the judge she wished to admit a fifteen second clip from the call in which Appellant allegedly says, "'Have you called him?' You know, it talks about calling Tony. 'You need to call him ASAP. He's got my phone.'" Tr. 465, ll. 2-7; The solicitor argued the jail call was "important" because Appellant testified that the reason he never called Tutu after the event was because he no longer had his phone since he left it in Tutu's car and thus he had no way of contacting her. Additionally, the solicitor asserted that Appellant was questioned on cross-examination about "Tony" and denied knowing Tony. Tr. 473, l. 15 – 475, l. 15.

After the clip was played multiple times in open court, defense counsel objected to its admission. Tr. 475, l. 21 – 477, l. 11. Counsel argued the evidence was not relevant and did not impeach Appellant's testimony. He contended the call did not suggest Appellant had access to his phone. Rather, Appellant simply asked the person on the other line whether she could get in touch with certain people. Counsel further asserted that he could not "even make out the names of the people that he's mentioning, whether one of them is Tony or not. And the basis for the

impeachment is to establish that he knows a Tony. I don't think, by any means, the State can claim that he says the word 'Tony' or name 'Tony' in that call." Tr. 477, ll. 13-23.

The solicitor claimed the clip was impeachment evidence because Appellant testified the phone was with Tutu but indicated otherwise during the phone call. Tr. 479, l. 24 – 480, l. 7. However, defense counsel countered that the call took place five days after Petitioner's arrest, which is when Petitioner testified Tutu had his phone, and that the phone could have "changed hands" multiple times during that five day period and ended up with "Tony." He argued that Appellant could have learned another individual subsequently had the phone and was trying to obtain the phone in an effort to get in touch with Tutu. Tr. 482, ll. 4-12.

Before ruling, the trial judge admitted "there are some parts of the audio that it could be argued are inaudible, that being who he [Appellant] said get the phone back from." However, the judge found the clip did bear on Appellant's credibility, which made it relevant. She determined that Appellant "did make the statement that he did not know where the phone was; that it had been left on the charger; that his phone left the park when she [Tutu] left; that he had no way of getting in touch with her because her number was on his phone; that he did not know her full name, he only knew her by this nickname . . . So the statement on the recording does contradict that because he gives whomever he's speaking to a direct command to get his phone from a 'him." And he's indicated he was with a female when he was at the park. So to the extent it contradicts his testimony that he had a lack of knowledge of where his phone was, it is relevant." Tr. 482, l. 15 – 483, l. 8. Lastly, the judge found the probative value of the phone clip was "not outweighed by any potential prejudice to [Appellant]." Tr. 483, ll. 8-10.

The recording of the jail call was later marked and admitted over Appellant's objection as State's Exhibit No. 27 during Melissa High's testimony. See Tr. 514, l. 15 – 517, l. 6.

Discussion

The trial judge abused her discretion by admitting a portion of a recorded telephone call between Appellant and his sister while Appellant was incarcerated pretrial where the evidence was not relevant since it did not impeach or contradict Appellant's testimony, and where any probative value of the evidence was substantially outweighed by the danger of unfair prejudice pursuant to Rule 403, SCRE.

"All relevant evidence is admissible." Rule 402, SCRE; See State v. Pagan, 357 S.C. 132, 142, 591 S.E.2d 646, 651 (Ct. App. 2004). "Relevant evidence" is defined as "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. "Under Rule 401, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy." Pagan, 357 S.C. at 142, 591 S.E.2d at 651 (citing In re Corley, 353 S.C. 202, 577 S.E.2d 451 (2003)).

The trial judge ruled that the admitted portion of the telephone call was relevant because it impeached or contradicted Appellant's testimony and Appellant had "put his credibility in play when he testified." See Tr. 482, l. 18 – 483, l. 8. However, there was nothing inconsistent between Appellant's testimony and his statements during the recorded call. Appellant testified before the jury that he was unable to contact Tutu after his arrest because he did not have her contact information. Appellant explained that during the short period of time that he knew her, he had communicated with Tutu by phone. While Tutu's number was saved as a contact in Appellant's phone, he did not have her number memorized. Tr. 431, ll. 14-17; Tr. 445, ll. 3-7. Appellant further maintained during his testimony that he had left his phone in Tutu's car while they were walking around the festival and, therefore, he could not call Tutu afterwards to "clear it all up" because he no longer had possession of his phone in which her number was saved. Tr.

430, ll. 15-23. On cross-examination, Appellant denied he had a friend named Tony. Tr. 462, ll. 1-12.

On the other hand, during the phone call, Appellant asked the woman on the other line if she was "gonna get in contact with 'em" and "you can't get in contact with Vin either? The woman responded that she could not and that she had tried "Suny's number." The woman told Appellant that "he," presumably "Vin" or "Suny" had Appellant's phone too. Appellant merely responded, "He got my phone too? I need to get all that ASAP." See State's Exhibit No. 27.

None of Appellant's statements during this phone call impeached or contradicted his testimony before the jury. The call took place on December 13, 2019, five days after Appellant's arrest during the early morning hours of December 8, 2019. Appellant had no control over his phone during this time period as he was incarcerated. As defense counsel argued at trial, the phone could have changed hands during this five day period outside of Appellant's control. Tutu could have called one of the contacts in Appellant's phone in an effort to return the phone to Appellant. Appellant's statements during the phone call make clear that he does not know who has possession of his phone or how that person obtained possession of the phone. Again, nothing Appellant said during the call was inconsistent with his testimony that he left his phone in Tutu's car during the festival and he did not have access to the phone after his arrest thus he could not obtain Tutu's contact information.

Even if the evidence was somehow relevant, it should have been excluded pursuant to Rule 403, SCRE. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE. For the same reasons the call was not relevant as argued above, it was also not probative. However, the recording was unfairly prejudicial to Appellant because it was improperly used by the state to demonstrate Appellant was not credible and Appellant's credibility was essential to his defense.

Additionally, at the beginning of the recording before the phone call starts, Appellant can be heard saying, "Damn boy, motherfuckers don't believe in a bruh no more." This use of profanity tainted Appellant's image before the jury and made him look like a bad person who had the propensity to commit carjacking.

In State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017), our Supreme Court held the trial judge abused his discretion by admitting an entire fifteen minute telephone call King made while he was incarcerated pretrial in the local detention center. King was tried for the attempted murder and armed robbery of a Charleston cab driver. Id. at 50, 810 S.E.2d at 19. The state's purpose in introducing the recording was to establish King's ownership of the cellphone number used to contact the cab company. Id. at 68, 810 S.E.2d at 29. King argued this could have been accomplished by introducing detention center phone logs. Id. Further, King maintained that any probative value of the recording was outweighed by the danger of unfair prejudice created by the recording, which contained a profanity laced conversation between King and another individual that inferred King had been charged with prior crimes similar to those for which he was currently on trial. Id.

Our Supreme Court agreed. The Court emphasized that while the recording was relevant to the state establishing King's ownership of the cellphone that called the cab company, it was not the only evidence that could have served this purpose. Id. at 69, 810 S.E.2d at 29. "Rather, the testimony of Sergeant Kevia Heyward, who was employed at the detention center, and the detention center call logs clearly established that King called this number sixty-three times in one month." Id. Moreover, the Court asserted the state could have agreed to the request that it stipulate to King's ownership of the cellphone. Id.

Lastly, the Court held the limited probative value of the fifteen minute recording was outweighed by the unfair prejudice to King since it was "riddled with profanity, racial slurs, and

impermissible references to King's prior bad acts." Id. at 69, 810 S.E.2d at 29-30 (citing State v. Cheeseboro, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001) ("Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one.")).

Like the Supreme Court in King, this Court should hold any probative value of telephone call between Appellant and his sister was outweighed by the unfair prejudice to Appellant. Respectfully, this Court should hold the trial judge abused her discretion by admitting the portion of the telephone call, reverse Appellant's conviction, and remand for a new trial.

CONCLUSION

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

Respectfully submitted,

s/ Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 6th day of December, 2023.