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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Honorable Michael S. Holt, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

COREY TYLER BUSCH,

APPELLANT

APPELLATE CASE NO. 2023-000299

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred admitting state's exhibit 31, toboggan hat and state's 32, bandana where the state failed to establish a sufficient chain of custody?

STATEMENT OF THE CASE

On December 11, 2019, a Horry County grand jury indicted appellant for armed robbery. R*. On February 13, 2023, appellant's case was called to trial before the Honorable Michael S. Holt and a jury. Tr. 1. Appellant was represented by Clay Pinkerton and Nicholas O'Neill. Tr. 1. The state was represented by assistant solicitors, George Debusk and Elizabeth Farmer. Tr. 1.

The jury found appellant guilty as indicted. Tr. 295, ll. 9-18. Judge Holt sentenced appellant to a term of sixteen years' imprisonment. Tr. 300, ll. 17-20.

This appeal follows.

STANDARD OF REVIEW

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (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.*

<u>**ARGUMENT**</u>

<u>The trial court erred admitting state's exhibit 31, toboggan hat and state's 32, bandana where the state failed to establish a sufficient chain of custody.</u>

Relevant facts

At trial the state presented evidence of the September 2019 robbery at a Dunkin Donuts restaurant in Horry County. Four employees were in the restaurant during the robbery but only two encountered the intruder. Tr. 47, l. 17-48, l. 2.

Restaurant employee, Brittany Tyler, testified she saw a man on the surveillance camera walking towards the restaurant and he walked in the front door. Tr. 45, ll. 7-12. Brittany described him as wearing a black hoodie and a facemask and having bright colored eyes, not brown, maybe green. Tr. 45, ll. 7-20; 53, ll. 12-23. She said that, although she never saw a gun, he told them he had a gun and it appeared he had a gun concealed in his sleeve. Tr. 46, ll. 8-17; 53, ll. 5-10. Brittany said he demanded money, and her coworker Heather Vanderbush gave him the money and he left. Tr. 46, l. 21-47, l. 15.

Restaurant employee, Heather Vanderbush, described the man as wearing blue jeans and a hoodie, "pulled up." Heather testified his eyes were "really glassy and [] dark." Tr. 240, ll. 14-23. Heather stated the man entered the restaurant, "[i]t looked like he had a gun, and he was like give me all of your money." Tr. 240, ll. 5-6. She testified she opened the registers, she gave him all the money, he put the money in his pocket, and he left the restaurant. Tr. 243, l. 12-244, l. 8.

Officer William Dietzel responded to the restaurant for an armed robbery. Tr. 58, ll. 1-4. Dietzel determined that the bloodhound tracking team should be called to the scene and members of the team, officers Mark Johnson and James Green, brought their dogs. Tr. 58, l. 19-59, l. 6; 64-92.

Officer Mark Johnson testified that he and his bloodhound dog, Gabby, responded to the restaurant that day. Johnson testified that during the track there were items of clothing including a "hoodie" and a "toboggan," found during the track.[1] Tr. 69, ll. 7-19. However, Johnson did not find the items and he did not know who found the items. Tr. 69, ll. 12-19; 76, ll. 4-11. Johnson testified Gabby became tired and distracted and he stopped her track. Officer James Green's dog began in that area and continued the track. Tr. 71, ll. 8-24.

Officer Green and his dog, Bella, responded to the restaurant that day. Tr. 81, ll. 16-24. Green testified Bella picked up the track where Gabby left off and Bella tracked to a building located in an apartment complex. Tr. 83, ll. 9-13; 85, ll. 13-24; 86, ll. 18-25; 88, l. 24-89, l. 11. Green testified he was not the officer that found the clothing items. He did not testify who found the items. Tr. 91, l. 10-92, l. 7.

Objection

During Investigator Sean Wydra's testimony the state sought to admit, state's exhibit 32, bandanna and state's exhibit 31, toboggan hat, purportedly found during the track and discussed above. Tr. 103; 108. Investigator Wydra testified he collected the items that day. However, Wydra testified "the dog [] found" the items, the items had been moved from where they were originally found, and he was not the officer that found the items. Tr. 98, l. 20-99, l. 11; 100, ll. 12-15; 101, l. 13-102, l. 16.

Defense counsel objected to the admission of state's exhibit 31, toboggan hat and state's exhibit 32, bandana. Counsel argued that because no officer testified as to having found these items the state had not established a chain of custody. Tr. 104, ll. 14-22. Defense counsel

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[1] During Johnson's testimony state's exhibits 5-8 photographs of the items were admitted. Tr. 70.

averred none of the testifying officers found the hat or bandana or removed them from the ditch where the items were supposedly found.

The solicitor replied it was not "important" that Investigator Wydra was not present when the toboggan hat and bandana were found because the items were found in the same area where Wydra collected them, and he was present when the dog tracked to that area. The solicitor asserted they established the chain as far as practical under *Hatcher*[2] where they presented testimony of the officers that tracked to the area where the items were found and where the they presented testimony of the officer collected the toboggan hat and bandana.

The trial court overruled defense counsel's objection to the admission of the bandana and the toboggan hat, stating "I do feel like he's properly identified, and I'm satisfied with the state's argument." Tr. 106, ll. 8-11; 107, ll. 6-8; 108, ll. 15-21.

Discussion

The chain of custody in this case was insufficient for admission of the bandana and toboggan hat where the none of the state's testifying witnesses found either item or could identify who had found the items and the trial court erred admitting the bandana and toboggan hat evidence over defense counsel's objection.

"[Our] Court[s] ha[ve] long held that a party offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far as practicable." *State v. Hatcher*, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (citing *State v. Sweet*, 374 S.C. 1, 6, 647 S.E.2d 202, 205 (2007)); *see also Benton v. Pellum*, 232 S.C. 26, 33, 100 S.E.2d 534, 537 (1957) (stating "it is generally held that the party offering such specimen is required to establish, at least as far as practicable, a complete chain of evidence").

2 *State v. Hatcher*, 392 S.C. 86, 708 S.E.2d 750 (2011).

"Where the substance analyzed has passed through several hands the evidence must not leave it to conjecture as to who had it and what was done with it between the taking and the analysis." *Benton*, 232 S.C. at 33–34, 100 S.E.2d at 537 (citation omitted). "Testimony from each custodian of fungible evidence, however, is not a prerequisite to establishing a chain of custody sufficient for admissibility." *Sweet*, 374 S.C. at 7, 647 S.E.2d at 206 (citing *State v. Taylor*, 360 S.C. 18, 27, 598 S.E.2d 735, 739 (Ct.App.2004)). "Where other evidence establishes the identity of those who have handled the evidence and reasonably demonstrates the manner of handling of the evidence, our courts have been willing to fill gaps in the chain of custody due to an absent witness." *Id.*

"Proof of chain of custody need not negate all possibility of tampering so long as the chain of possession is complete." *State v. Carter*, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001). "In applying this rule, [the Court] [has] found evidence inadmissible only where there is a missing link in the chain of possession because the identity of those who handled the [substance] was not established at least as far as practicable." *Id.*

In *South Carolina Dep't of Soc. Servs. v. Cochran*, 364 S.C. 621, 629, 614 S.E.2d 642, 646 (2005), the South Carolina Supreme Court noted "[w]hether the chain of custody has been established as far as practicable clearly depends on the unique factual circumstances of each case." *Cochran*, 364 S.C. at 629 n. 1, 614 S.E.2d at 646 n. 1. In examining issues regarding the chain of custody, a mere suggestion that substitution could possibly have occurred is not enough to establish a break in the chain of custody. *State v. Hatcher*, 392 S.C. 86, 94, 708 S.E.2d 750, 754 (2011).

In *Hatcher* the Court analyzed whether the trial court erred in the admission of drug evidence where the state did not identify all the persons who handled the drug evidence under the

following factors: the nature of the evidence, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it. *Id.* at 94-95, 708 S.E.2d at 754-55. In that case the Court concluded that the standard was "whether, in the discretion of the trial court the state had established the chain of custody as far as practicable." *Id.* at 95 S.E.2d at 755.

It is entirely practicable to require the state to, at the very least identify, who found two pieces of key evidence. Here, *no one* testified as to having found this evidence. Investigator Wydra claimed the dogs tracked to the items but neither of the officer dog handlers testified they discovered or that their dog tracked to this evidence. Additionally, no testifying law enforcement officers knew who had found this evidence and moved it from where it was found to where it was later collected.

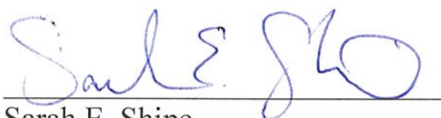
The bandana and toboggan hat were critical evidence that the state used to tie appellant to this crime through DNA testing of the items. Tr. 184-86. The state's expert testified that a swab from the bandana showed a DNA profile of one individual that was 190 octillion times more likely that appellant contributed than if an unidentified, unrelated individual contributed. Tr. 183, l. 14-184, l. 20. The expert testified that a swab from the hat showed a mixture of three individuals and was 27 octillion times more likely that appellant and two unidentified unrelated individuals contributed than if three unidentified, unrelated individuals contributed. Tr. 185, l. 17, 186, l. 7.

The trial judge erred by summarily overruling defense counsel's objection to the evidence where the state's witnesses admitted they did not know who purportedly found and moved this critical evidence. The chain of custody in this case was legally insufficient for admission of the

bandana and toboggan given the identity of the person who supposedly found the evidence was unknown and the trial court erred in admitting the evidence over appellant's objection.

CONCLUSION

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



Sarah E. Shipe
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ATTORNEY FOR APPELLANT

This 8th day of January, 2024.