STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Pickens County
Edward R. Miller, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

LAROLD LEE MORRIS,

APPELLANT.

Appellate Case No. 2013-000682

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

I. The trial court erred by denying Appellant's motion to suppress evidence obtained pursuant to a search warrant based on a conclusory affidavit.

II. The erroneous admission of evidence was not harmless.

STATEMENT OF THE CASE

During its 2012 term, a Pickens County Grand Jury indicted Appellant for burglary first degree (2012-GS-39-0700) and possession of a pistol with obliterated serial number (2012-GS-39-0752). During its 2013 term, a Pickens County Grand Jury indicted Appellant for armed robbery (2013-GS-39-0457) and conspiracy (2013-GS-39-0458). (Indictments; March 19-20, 2013, Transcript ("Tr.") 12-13). The prosecution, represented by John Baker Cleveland, III, and Samuel Barton Tooker, called Appellant to trial on March 18, 2013. David D. Cantrell, Jr., represented Appellant. (Tr. 1). On March 18, jury was selected before the Honorable Letitia H. Verdin. (March 18, 2013, Transcript 1). The Honorable Edward R. Miller presided over the jury trial on March 19-20. (Tr. 1). The jury found Appellant guilty as charged. (Tr. 334). Judge Miller sentenced Appellant to twenty-five years on each of the burglary and armed robbery charges, and five years on each of the possession and conspiracy charges, all of which he ordered to run consecutively. (Tr. 339).

Appellant filed a timely notice of appeal. This brief follows.

STATEMENT OF FACTS

On February 3, 2011, college student Kyle Whitaker was playing video games in the apartment he shared with three other students—Apartment 190H in University Village in Central, South Carolina—when he heard a knock at the door. (Tr. 103-105). When he opened the door, there were two individuals, one of whom was wearing a hoodie and mask with black mesh covering the eyes. (Tr. 105-06). One of the individuals called the other one "Junior." (Tr. 106). One of the individuals had a black gun. (Tr. 106, 111:3-9). They forced Whitaker to lie on the ground while they ransacked the apartment and took various items, including some electronic items and his roommate Michael Capo's Xbox. (Tr. 106, 108). Whitaker could not describe the masked individual, except to say he "thought" he was African-American "just by the voice." (Tr. 110:14-111:2). The entire incident last "15, maybe 20 minutes." (Tr. 106:23-107:1).

The roommate Capo testified that a short time after the robbery, he was playing Xbox online and saw his "gamer tag," "Capo Almighty," online. (Tr. 124:3-12). When he clicked on his gamer tag, someone had changed the motto to "Flight Risk," "North Carolina Get Money," and the avatar was changed to an African-American male. (Tr. 127:4-17). Later, Capo saw that the gamer tag was changed also, to "Lil Abbel." (Tr. 127:21-128:1). He reported this to the police. (Tr. 128:2-5). The Court admitted pictures of the Xbox screen showing the gamer tags and avatars, which pictures were taken by the police after they recovered the Xbox. (Tr. 125:24-127:2, 246).

On March 8, 2011, a third roommate, Zeke Quinn, was returning to University Village when he saw three African-American individuals wearing hoods standing outside the door at what was, at this point, his old apartment, Apartment 190H. (Tr. 140). Quinn

called his roommates and the police, had his other roommate Derek Mahaney block one exit of the parking lot with his truck, and reported the individuals' activity and that they were leaving in a silver Impala to the police. (Tr. 143-45). Quinn testified that he had observed no criminal activity, just that the individuals had a "suspicious demeanor." (Tr. 146:21-147:3). Mahaney also saw the individuals at the door, and testified that one was wearing a "half mask." (Tr. 155:20-25, 157:17-19). Mahaney testified that there was nothing suspicious about three individuals standing at the door to his old apartment, just that he was suspicious of them because of the robbery a month earlier. (Tr. 163:5-13).

Police Officer Kevin Peppers pulled the Impala over shortly after it left University Village. (Tr. 175-76). D'Andre Draper was driving the car, Appellant was in the front passenger seat, and Ernest Cade was in the back seat. (Tr. 177-78). Draper consented to a search of the car. (Tr. 178:22-23). Officer Peppers found the following items in the car: a box of latex gloves located on the floor at Appellant's feet (Tr. 178); a black-and-green handgun in a backpack in the rear passenger compartment (Tr. 179:3-24); a silver handgun with the serial number obliterated in a backpack in the rear passenger compartment (Tr. 179:3-24, 181:24-182:10); a black mask on the floor in the rear passenger compartment (Tr. 181:10:19, 187:17-188:5).

Draper testified that he was giving Appellant and his brother a ride to University Village because he was going there himself to see a friend. (Tr. 201:24-202:2, 204:9-20). Draper's friend was not there, so they got back in the car and were driving off when Officer Peppers pulled them over. (Tr. 204:16-20). After Police Investigator Khristy Justice told Draper the other passengers in his car attributed the guns to him, he showed her a text message from Appellant that said "let's get Zikee." (Tr. 207-08). However, Draper testified

the text message was not from the night they were arrested. (Tr. 223:13-17, 225:12-19). Draper testified that the latex gloves belonged to his mother. (Tr. 218:13-219:6).

Investigator Justice testified about Capo reporting someone else using his Xbox gamer tag and changing it to "Little Abe" (Tr. 232:10-25), and that Appellant reported to her that his gamer tag was "Little Abe" (Tr. 240:5-13).

Officer Justice sought and obtained a search warrant for the residence of Appellant's sister, where he lived. (Tr. 243:17-244:16; Court's Exhibit 1 (Search Warrant issued March 9, 2011, with supporting Affidavit ("Aff.") and Return). In Court, Investigator Justice explained that her basis for seeking the warrant was the use of Appellant's nickname "Junior during the February 3 robbery, Appellant's use of the gamer tag "Little Abe," and that Appellant told her he was playing Xbox the night of March 8. (Tr. 243:21-244:13). However, none of this is explained in her affidavit in support of the warrant, and there is no evidence that she relayed this information to the magistrate outside of the affidavit. Officer Justice wrote in her affidavit:

> DESCRIPTION OF PROPERTY SOUGHT
>
> Ipods, X-box game systems/games, laptops, luggage, backpacks, masks, televisions, cell phones or any other electronic devices.
>
> . . .
>
> REASON FOR AFFIANT'S BELIEF THAT THE PROPERTY SOUGHT IS ON THE SUBJECT PREMISES
>
> Larold Lee Morris, a tenant in the above referenced apartment, is suspected in several armed robberies in the City of Central. During the course of the robberies items such as IPODS, laptops, Televisions, Xbox game Systems/games, cell phones and other electronics were taken from the victim's homes. The suspect(s) in these cases used a handgun, latex gloves, masks and dressed in all black driving a silver Chevy Impalla. This vehicle was stopped on 3/8/2011 in the Town limits of Central and once I began

interviewing the subjects and locating the firearms it is believed that the stolen property is located in said apartment.

(Aff.).

During execution of the search warrant, Officer Justice found Capo's Xbox, and when she turned it on she saw and took pictures of the "Little Abe" avatar and gamer tag. (Tr. 245:21-246:18). Investigator Justice found nothing of relevance at the apartment other than the Xbox and an Xbox game. (Tr. 262:14-21).

Investigator Justice also executed a search warrant on the Impala and found two more masks (Tr. 252:12-253:4). A forensic expert found Appellant's DNA profile on one of the masks (Tr. 282:23-24), and testified that there was a 1 in 59 chance it was an unrelated person's DNA (Tr. 283:14-16). However, on cross-examination the expert admitted that the chance it was Appellant's brother's DNA was higher. (Tr. 285:14-16) The back-seat passenger, Mr. Cade, was Appellant's brother. (Tr. 204:9-11)).

ARGUMENT

I. The trial court erred by denying Appellant's motion to suppress evidence obtained pursuant to a search warrant based on a conclusory affidavit.

Before trial, Appellant moved to suppress any evidence seized from his sister's apartment where he lived. (Tr. 75-77). Appellant challenged Officer Justice's affidavit supporting the search warrant as conclusory in that it did not explain why property stolen in the crimes charged would be found in the residence. (Tr. 76-77). The court denied the motion, but noted "there are some conclusory statement in there" and stated: "It coulda been more specific, should be more specific but it's not, uh, does not fall to a level that I feel is require[d] to be, uh, your motion to be granted, okay." (Tr. 77:24-78:7).

The Fourth Amendment of the United States Constitution and Article 1, Section 10 of the South Carolina Constitution guarantee "[t]he right of the people to be secure [from] unreasonable searches and seizures." Evidence obtained in violation of these provisions is inadmissible. E.g., State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001). A search warrant violates the Fourth Amendment and Article 1, Section 10 if there was an insufficient basis for a finding of probable cause to support the warant. State v. Baccus, 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006), cert. denied 129 S. Ct. 733, 172 L. Ed. 2d 735 (2008). The reviewing court must ensure that the issuing magistrate had a substantial basis upon which to conclude that probable cause existed. Id. Whether probable cause existed is based on a "totality-of-the-circumstances":

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Id. (quoting Illinois v. Gates, 462 U.S. 213, 238, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983)). Search warrants may be issued "only upon affidavit sworn to before the magistrate . . . establishing the grounds for the warrant," S.C. Code Ann. § 17-13-140 (2003), and the affidavit "must set forth particular facts and circumstances underlying the existence of probable cause to allow the magistrate to make an independent evaluation of the matter," Baccus, 367 S.C. at 50-51, 625 S.E.2d at 221 (emphasis added) (citing Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978)).

In Baccus, the Supreme Court of South Carolina held that the trial court erred in admitting evidence seized pursuant to a warrant based on a police officer affidavit. Baccus, 367 S.C. at 52, 625 S.E.2d at 222. The defendant was accused of murdering his former girlfriend. The victim was on the phone with a friend when she was shot, and the friend told the police that the victim said defendant was there and that she heard the defendant say "I'm gonna kill your ass," followed by gunshots. The investigating officer relayed this information to another officer, who went to defendant's residence and arrested him after finding a smoldering pile of clothes in the back yard and a red substance on defendant's car parked a quarter mile from the house. Id. at 46, 625 S.E.2d at 218-19. The investigating officer then relayed these facts to a third officer, who completed an affidavit stating:

> DESCRIPTION OF PROPERTY SOUGHT
>
> Any evidence such as: clothing, shoes, weapons, or forensics evidence such as blood. Which maybe connected with the Homicide of Brenda K. Godbolt which occurred in Marion County. . . .
>
> REASON FOR AFFIANT'S BELIEF THAT THE PROPERTY SOUGHT IS ON THE SUBJECT PREMISES
>
> At the time of the suspects (sic) arrest at 2616 Alligator Rd. in Florence County, by Investigators Barry Prosser and Von Dean Turbeville with

> Florence and Marion County Sheriff's Office. A pile of what appeared to be clothing was lying on the ground beside the residence smoldering in plain view, and a vehicle the suspect was apparently driving was located approximately 1/4 of a mile from this residence with blood stains on the inside and outside of the vehicle.

Id. at 51-52, 625 S.E.2d at 221-22. Because the affidavit "fail[ed] to set forth any facts as to why police believed Appellant committed the crime," and because its language "lack[ed] specificity and contain[ed] conclusory statements," the Court held that the trial court erred in admitting clothing, shoes, and a vehicle key into evidence at the trial. Id. at 47, 52, 625 S.E.2d at 219, 222.

The Court in State v. Smith similarly found an affidavit defective because it failed to explain why police believed the defendant committed a crime. 301 S.C. 371, 392 S.E.2d 182 (1990). The defendant moved to suppress the knife he allegedly used in a robbery. The prosecution obtained the knife in a search of defendant's hotel room. The affidavit supporting the search warrant stated:

> That on May 12th at approximately 11:45 p.m. Reginald Jerome Smith went into the Master Inn located at 1468 Savannah Hwy., Charleston, S. C. and he then robbed the manager at knife point. Smith has been staying at The Host of America Room 216 since Jan. 1, 1988 and there is every reason to believe the weapon and clothes used in the robbery will be located in the room. This information was confirmed in person by Sgt. Sherman on 05/13/88.

Id. at 372, 392 S.E.2d at 183. The Court held that the affidavit was "defective on its face" because it provided insufficient factual assertions for the magistrate to make a determination as to probable cause. Although the record showed that the police relied on an informant, there was no indication that this was made known to the magistrate. Thus, the affidavit failed to state why the police believed the defendant committed the robbery. Id. at 373, 392 S.E.2d at 183; see also State v. Weston, 329 S.C. 287, 494 S.E.2d 801 (1997) (holding that an affidavit supporting a search warrant could not have provided a substantial basis for

finding probable cause to search the defendant's car because it failed to set forth any facts as to why police believed he committed the crime and the first three sentences of the affidavit contained conclusory statements); State v. Jenkins, 398 S.C. 215, 727 S.E.2d 761 (Ct.App.2012) (holding that a search warrant affidavit did not meet the requirements of Baccus because it did not show why the police believed the defendant committed the crime charged); State v. Gentile, 373 S.C. 506, 646 S.E.2d 171 (Ct.App.2007) (holding that the affidavit and supplemental oral testimony to the magistrate did not support a finding of probable cause).

Nor may a trial court assume that a magistrate inferred certain facts sufficient to support probable cause. In Jenkins, the State argued that because the defendant was accused of a sex crime, the magistrate could reasonably have inferred that the victim was the source of the affidavit statement that defendant was the perpetrator. Jenkins, 398 S.C. at 223, 727 S.E.2d at 765. The Court of Appeals held that the law did not allow the State to justify the search "on the possibility that a magistrate made a correct inference as to the source of the information in the affidavit." Id. at 223, 727 S.E.2d at 765.

Here, Investigator Justice's affidavit fails to explain why she believed Appellant committed the crimes charged. Investigator Justice stated that Appellant was suspected in several armed robberies. (Aff.). She stated that certain items were used in the robberies, and that the perpetrators were driving a silver impala. She then stated that this vehicle was stopped, and that once she began "interviewing the subjects and locating the firearms" she came to believe that the stolen property was located at Appellant's apartment. (Aff.). She did not, however, explain in her affidavit why she believed that Appellant committed the crimes charged, only "this is what I did," and "I believe he did it." There is no connecting

of the dots; no explanation of why she believed he did it. The affidavit therefore fails to support a finding of probable cause. See, e.g., Baccus, 367 S.C. at 47, 52, 625 S.E.2d at 219, 222; Smith, 301 S.C. at 373, 392 S.E.2d at 183. Indeed, the only way the trial court could have concluded that the magistrate was presented with information sufficient to establish probable cause was for it to assume inferences on the part of the magistrate: that the "subjects" were in the car, and that they implicated Appellant in the crimes. Jenkins prohibits the trial court from making such assumptions. See Jenkins, 398 S.C. at 223, 727 S.E.2d at 765.

Because the affidavit in support of the search warrant for the apartment was insufficient for the magistrate to find probable cause, the warrant was invalid and therefore the results of the search—the Xbox and Xbox game and the pictures and testimony based on the search—should have been excluded.

III. The erroneous admission of evidence was not harmless.

An error is harmless only if this Court determines that "beyond a reasonable doubt the error complained of did not contribute to the verdict obtained." State v. Jenkins, 398 S.C. 215, 225, 727 S.E.2d 761, 766 (Ct.App.2012) (internal quotation marks omitted). In Jenkins, the court found that the issue of the DNA evidence connecting the defendant to the sex crime was not harmless because, absent this evidence, the State would had to have relied solely on the victim's testimony. The DNA evidence—which an expert testified had a one-in 8.6 quintillion chance of error—was the strongest piece of evidence connecting the defendant to the crime. Therefore this Court could not conclude its admission was harmless. Id. at 226-27, 727 S.E.2d at 767.

Like the DNA evidence in Jenkins, the evidence from the apartment search and the testimony concerning it was the strongest evidence connecting Appellant to the crimes charged. The trial judge noted as much, stating that the prosecution "pretty much ha[]d him nailed" because they recovered the Xbox at Appellant's apartment. (Tr. 42:4-19). Absent the Xbox, the State's case against Appellant consisted of: (1) an eyewitness who could not identify Appellant except by the most common of nicknames—"Junior" (Tr. 106); (2) confusing testimony (but not the descriptive photos that should have been suppressed) about Xbox "gamer tags" (Tr. 123-31); (3) a purported accomplice, Draper, who testified inconsistently except that he was certain the text message "let's get Zikee" was not sent by Appellant the night of the robbery (Tr. 200-27; Tr. 223:13-17; 225:12-19); and (4) DNA evidence suggesting that Appellant at some point likely wore a mask found in the car, but that it could have been worn by his brother who was also in the car (Tr. 282:23-24; 285:14-16). Absent solid evidence about the February 3 robbery, there was very little evidence of any crime on March 8. No witness testified that they observed criminal activity outside of the apartment on March 8. (Tr. 146:21-147:3, 163:5-13, 194:12-17). And the silver gun with the obliterated serial number was discovered in the back seat of the Impala, closer to the back seat passenger than to Appellant in the front seat. (Tr. 179:3-24, 181:24-182:10).

This court cannot conclude beyond a reasonable doubt that admission of the Xbox did not contribute to the guilty verdict. Therefore, the trial court's error was not harmless. See Jenkins, 398 S.C. at 225, 727 S.E.2d at 766.

CONCLUSION

For the reasons stated above, the Court should reverse Appellant's convictions and sentences and remand this matter for a new trial.

Respectfully submitted,

By: [signature]

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ATTORNEYS FOR APPELLANT

This 25th day of November, 2013.

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DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True–billed indictments (2012-GS-39-0700, 2012-GS-39-0752, 2013-GS-39-0457, and 2013-GS-39-0458);
(2) Sentence sheets;
(3) March 18, 2013 Transcript p. 1;
(4) March 19-20 Trial Transcript pp. 1; 42; 75-78; 93-102 (opening statements); 103-108; 110-11; 123-31; 140; 143-47; 155; 157; 163; 175-79; 181-82; 187-88; 194; 200-27; 232; 240; 243-44; 245-46; 252-53; 262; 282-83; 285; 295-317 (closing statements); 334; 339; and
(5) Court's Exhibit 1 (March 9 Search Warrant with Affidavit and Return).

I certify that this designation contains no matter which is irrelevant to this appeal.

By: RJM

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced served on the date below upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201.

By: RMcC
Name:

SUBSCRIBED AND SWORN TO before me
this 25th day of November 2013.

Paula McKee (L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.