

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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JAN 06 2014

SC Court of Appeals

Appeal from Aiken County

J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TYRIK GERARD BRIGHT,

APPELLANT

APPELLATE CASE NO. 2013-0001354

INITIAL BRIEF OF APPELLANT

WANDA H. CARTER
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TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES 2

STATEMENT OF ISSUES ON APPEAL 3

STATEMENT OF THE CASE 4

ARGUMENT 5

The trial judge erred in allowing the jury to hear the burglarized store owner’s testimony identifying appellant as the perpetrator after reviewing a list of pre-release workers who were seasonal hires at the store because this information was bad character evidence and prejudicial prior bad act evidence clearly establishing that appellant possessed a criminal record..... 5

The trial judge erred in allowing into evidence Officer Glover’s testimony that he recognized the burglar on the store video surveillance camera as appellant because the prejudicial value of the officer’s obvious familiarity with appellant, which was bad character evidence and evidence of appellant’s prior criminal exposure, was outweighed by any probative value, particularly since both store owners testified at trial identifying the burglar as appellant..... 8

CONCLUSION 9

TABLE OF AUTHORITIES

Cases

State v. Herring, 387 S.C. 201, 692 S.E.2d 490 (2010) 8, 9

State v. Peake, 302 S.C. 378, 396 S.E. 2nd 362 (1990)..... 7

State v. Smith, 309 S.C. 409, 419 S.E. 2nd 816 (1992)..... 7

Constitutional Provisions

S.C. Const. art. 1, §3 7, 9

U.S. Const. amend. XIV 7

Rules

Rule 403, SCRE.....7, 8

STATEMENT OF ISSUES ON APPEAL

The trial judge erred in allowing the jury to hear the burglarized store owner's testimony identifying appellant as the perpetrator after reviewing a list of pre-release workers who were seasonal hires at the store because this information was prejudicial prior bad act evidence clearly establishing that appellant possessed a criminal record.

The trial judge erred in allowing into evidence Officer Glover's testimony that he recognized the burglar on the store video surveillance camera as appellant because the prejudicial value of the officer's obvious familiarity with appellant, which was bad character evidence and evidence of appellant's prior criminal exposure, was outweighed by any probative value, particularly since both store owners testified at trial identifying the burglar as appellant.

STATEMENT OF THE CASE

Appellant Tyrik Gerald Bright was convicted of second degree burglary per jury trial held during the June 2013 term of the Aiken County General Sessions Court before Judge J. Derham Cole. Appellant was sentenced to imprisonment for a period of twelve years. C. David Hayes and Michael D. Routzong represented petitioner at trial, and Assistant Solicitors Nicholas R. McCarley and Elizabeth Burkhalter appeared on behalf of the state.

Appellant appealed his trial court conviction and sentence. This brief follows.

QUESTION I

The trial judge erred in allowing the jury to hear the burglarized store owner's testimony identifying appellant as the perpetrator after reviewing a list of pre-release workers who were seasonal hires at the store because this information was bad character evidence and prejudicial prior bad act evidence clearly establishing that appellant possessed a criminal record.

At trial, Police Officer Christopher Walker testified that on December 25, 2011, he received a break-in call from All-Star Rentals Store located on Williamsburg Street in Aiken, South Carolina. Apparently, the break-in occurred at some point between December 24, 2011, after 1:00 pm and December 25, 2011. Officer Walker testified that he viewed the digital video recorded surveillance camera tape during his investigation into the case, but could not identify appellant as the perpetrator. Tr. 50, l. 10.

Police Officer Anthony Glover testified that he reported to the scene also on that date and likewise viewed the videotape from the surveillance camera. Officer Glover testified that he was able to identify the burglar appearing in the store after hours as appellant. Tr. 100, l. 4-p.106, l. 24.

Mike Fanning and Mary Fanning (Wolf), both of whom co-owned the store in question, testified that items were taken from their store. Both explained that they hired manual laborers in 2011 to perform seasonal work and that appellant was a seasonal hire who worked from September 19, 2011, through to December 21, 2011. Both Mike Fanning and Mary Fanning (Wolf) claimed that after viewing the tape, they recognized the perpetrator in the store after hours as the appellant. Tr. 69, l. 9-p. 80, l. 22; TR. 85, l. 1-p. 94, l. 7.

However, Mary Fanning Wolf made prejudicial prior bad act statements about appellant at trial while explaining how she recognized the perpetrator as follows:

Solicitor: Ms. Wolf, did you make a list of all the people that worked at All-Star Rentals between July of 2011 and December of 2011?

Ms. Wolf: Yes, sir.

Solicitor: And did you consider all of those people and the possibility of their involvement in this?

Ms. Wolf: I did.

Defense Counsel: Judge, I object. This is outside of my cross.

Solicitor: Your Honor, I believe it's firmly in the scope of his cross. He discussed seasonal workers, other workers implying the possibility of other peoples' involvement of misidentification.

The Court: Overruled. Go ahead.

Solicitor: Would you mind telling me a little bit about the people on that list?

Ms. Wolf: Well, I started by the females, took them off the list. And then I had no choice but to segregate the number of blacks that were on the list and the number of whites. And then I took the names of males because at that time we had a pre-release program where we brought gentlemen from the pre-release program for work –

Defense Counsel: Judge, I'm going to object. Sidebar?

(Off-the-record discussion.)

Solicitor: Ms. Wolf, not discussing Tyrik Bright but discussing the rest of the people, you can go on.

Ms. Wolf: So then I pulled out the fellows, we may have had three, four, I'm not sure of the number that came from the pre-release program. So it really didn't matter what color or nationality they were, they go home every night to what we call that camp. And so they were out of the possibilities and that just left a few behind.

Solicitor: Did you see Tyrik Bright on that video?

Defense Counsel: Objection. Asked and answered.

The Court: Overruled.

Tr.96, l. 15 – 98, l. 10.

Prior to trial, counsel moved to exclude this testimony as a violation of Rule 403, SCRE, but the Court denied the motion. Pretrial Hearing Tr. 11, l. 1 – l. 17; Trial Transcript p. 29, l. 13 – p. 31, l. 17. Evidence of prior bad acts is inadmissible to show that the accused is a bad person or had the propensity to commit the crime charged. State v. Peake, 302 S.C. 378, 396 S.E. 2nd 362 (1990); State v. Smith, 309 S.C. 409, 419 S.E. 2nd 816 (1992). Here, the testimony in question violated Rule 403, SCRE, as bad character evidence as it alerted the jury to the fact that appellant had a prior record due to his pre-release detainee status and was chosen obviously to participate in a work release program before his exit from prison. Note further that this prejudicial testimony was emphasized even more by the fact that Officer Glover testified that he recognized appellant on the tape as the burglar because this showed a level of familiarity by law enforcement, which suggested that appellant had prior connections to criminal activities in the past. Note that prior to trial, counsel also moved to exclude Officer Glover's testimony about his identification of appellant as the perpetrator due to the obvious prejudice, but that the Court denied the motion. Pretrial Hearing Transcript p. 17, l. 13 – p. 22, l. 21. Clearly, the prejudicial testimony at issue was probably interpreted by the jury to mean that appellant committed crimes in the past, and that he had a predisposition to commit crimes in general, and was probably guilty of the instant burglary crime for which he was on trial.

The trial judge erred in allowing the jury to hear this prejudicial prior bad act testimony as such deprived appellant of his right to a fair trial guaranteed under the Fourteenth Amendment to the United States Constitution and article 1, §3 of the South Carolina State Constitution.

QUESTION II

The trial judge erred in allowing into evidence Officer Glover's testimony that he recognized the store burglar on the store video surveillance camera as appellant because the prejudicial value of the officer's obvious familiarity with appellant, which was bad character evidence that suggested that appellant had a prior record or previously engaged in criminal activities, was outweighed by any probative value, particularly since both store owners testified at trial identifying the burglar as appellant.

Both store owners testified at trial that they recognized the store burglar caught on videotape as appellant because he was one of their seasonal hires. Therefore, there was no need for Officer Glover to testify at trial regarding his identification since the store owners' identification testimony was presented to the jury and because this verification was cumulative and prejudicial as the inference was that his (the officer's) recognition emanated from having prior dealings with appellant in a criminal context. Tr. 100, l. 4 – p. 106, l. 24; Tr.31, l. 20 – p. 33, l.2.

Prior to trial, defense counsel moved to exclude Officer Glover's identification testimony because the same violated Rule 403, SCRE, as bad character evidence, but the motion was denied. Pre-Trial Hearing Tr 11, l. 1 -p. 14, l. 13 and, Tr. P.17, l. 13 – p. 22, l. 21; Tr. 29, l. 13 – p. 31, l. 19.

This same type of identification by a police officer was condemned in the case of State v. Herring, 387 S.C. 201, 692 S.E.2d 490 (2010), but saved from reversible error due to a curative instruction given by the trial judge in the case. In Herring, the manager of a strip club was shot by a car passing by and the event was captured on videotape. Apparently, the defendant in Herring was angry because he was banished from the club by the manager and therefore, the state's theory of the case was that the defendant returned later driving his vehicle by the club and opened gunfire on the manager who was standing outside the club. Two officers and the club bouncer all viewed the

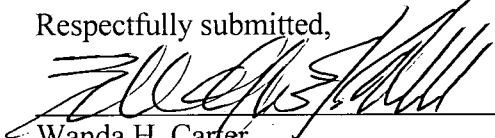
videotape and testified at the Herring trial that they recognized the defendant's vehicle drive up and saw light (gunfire) emanating from that vehicle at the same time the manager was shot dead. The trial judge in Herring gave a curative instruction regarding how these three opinion were lay opinions to cure the prejudice. To the contrary, Officer Glover's testimony in appellant's case was also an opinion, but it was an opinion obviously grounded in some prior familiarity with appellant in the criminal context (unlike in Herring), which in turn prejudiced petitioner's defense. Furthermore, no curative instruction was given in appellant's case.

Here, the cumulative effect of the co-owners testimony that the perpetrator on the videotape was appellant, who was a convict on a pre-release program, coupled with the police officer's identification of the perpetrator from the videotape to be appellant presumably based on his familiarly with appellant most probably in the criminal contest, clearly constituted evidence that was more prejudicial than probative. See counsel's objection in this regard at Tr. 31, l. 20 – p. 33, l.2. This violated appellant's right to a fair trial guaranteed under the Fourteenth Amendment to the United States Constitution and article 1, §3 of the South Carolina State Constitution.

CONCLUSION

Based on the foregoing arguments, counsel for appellant would request that his conviction and sentence be reversed and his case remanded to the trial court for a new trial.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 6th day of January, 2014.

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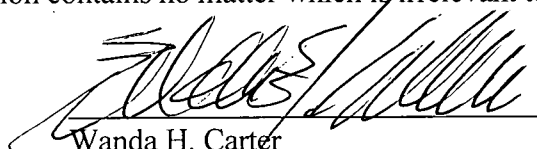
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment(s);
- (2) Entire Trial Transcript dated June 10, 2013
Tr. 3-29
- (3) Entire Trial Transcript dated June 11-12, 2013
Tr. 29-34; Tr. 46 – 109; Tr. 114; Tr. 116 – 142; Tr. 145-146;
Tr. 149 – 151.

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

January 6th, 2014.



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THE STATE,

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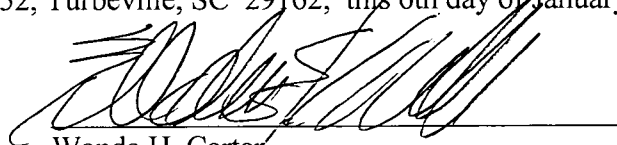
V.

TYRIK GERARD BRIGHT,

APPELLANT

CERTIFICATE OF SERVICE

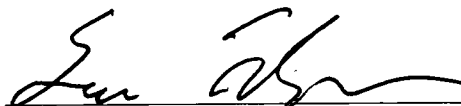
The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Tyrik Gerard Bright, #272194, at Turbeville Correctional Institution, PO Box 252, Turbeville, SC 29162, this 6th day of January, 2014.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 6th day of January, 2014.



(L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022