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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

Roger L. Couch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CHRISTOPHER LEE EMMONS,

APPELLANT.

APPELLATE CASE NO. 2013-002018

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF ISSUES ON APPEAL

I. The Trial Court erred in refusing to exclude evidence that a police dog tracked a human scent from the entrance of the attempted robbery victim's neighborhood to a Walmart where this dog track could not be connected to Appellant and therefore was irrelevant and inadmissible at trial.

II. The Trial Court erred in admitting the witness's in-court identification of Appellant where the witness only identified Appellant after the witness observed still photographs of Appellant taken from the Walmart surveillance video which law enforcement distributed to the media naming the individual in the photographs as the person of interest in the attempted robbery where this procedure was unduly suggestive and inherently unreliable.

III. Where the State lost or destroyed the Walmart surveillance video, the Trial Court was required to either dismiss the indictment against Appellant or suppress all evidence relating to the Walmart surveillance video footage, including the photograph stills taken from the video and the witness's identification of Appellant from the photograph stills released to the media by the State, where the surveillance video possessed an exculpatory value apparent before the evidence was destroyed and Appellant cannot obtain other evidence of comparable value by other means.

STATEMENT OF THE CASE

On February 23, 2012, the Spartanburg County Grand Jury indicted Appellant Christopher Emmons of one count of attempted armed robbery in violation of S.C. CODE ANN. § 16-11-330(B). R.*.

Appellant was tried before the Honorable Roger L Couch and a jury on September 11-13, 2013. Tr. 1. Appellant was represented by Beverly D. Jones, and the State was represented by Assistant Solicitor Danny N. Fulmer, Jr. Id.

The jury found Appellant guilty of attempted armed robbery. Tr. 309, ll. 15-20. Judge Couch sentenced Appellant to ten years imprisonment. Tr. 317, ll. 15-28.

Appellant timely filed and served his Notice of Appeal.

STATEMENT OF FACTS

During the late evening hours of Sunday, August 28, 2011, Jackie Harrison had left his parents' house after watching a football game, stopped by an ATM machine at a nearby bank, and drove to his house on Cottage Mill Run, located approximately two miles from his parents' house. Tr. 106, l. 23 - 107, l.16.

When Harrison pulled into his driveway and turned his car off, he noticed a car slowly coming up the road. He opened his car door, had one window down, and turned off the inside light of his car so he could see out. He noticed the car on the road hitting its brakes and stopping. Tr. 107, ll. 17-21.

Around the time the car on the road stopped, Harrison heard footsteps running up his driveway. He leaned over to look out his passenger window, and he retrieved his gun from the glove compartment of his car. Tr. 107, ll. 22-25. In the door mirror on the passenger side of his car, Harrison noticed someone coming around the back corner of his car. He thought this person had a twelve-gauge shotgun and so Harrison shot and killed this person, whose last name was later identified as Fowler.[1] Tr. 108, ll. 1-22; 115, l. 23 – 116, l. 1; 117, ll. 1-4; 121, ll. 16-19; 220, ll. 12-17. It turned out that Fowler was holding a tire iron. Tr. 130, ll. 2-3; 215, ll. 14-18.

After he shot and killed this first person, Harrison testified that he then noticed another person, who he would later claim was Appellant, coming through the bushes and flower bed between his driveway and his neighbor's driveway. Tr. 108, ll. 3-5; 109, ll. 5-19. Harrison said he took a shot at the person believed to be Appellant, and Appellant

[1] The trial transcript does not reveal the full name of the person Jackie Harrison shot and killed in his driveway.

just froze. Harrison claimed he held the gun on Appellant for two seconds, and then Appellant turned around and ran off. Tr. 108, l. 25 – 109, l. 3; 152, ll. 12-15. Harrison also claimed that he had an opportunity to see Appellant's face clearly at that point, even though he admitted it was "pitch black" and "real dark" outside. Tr. 109, ll. 4-6; 13, ll. 19-21; 152, ll. 16-21. He said Appellant was standing right where the light of street light happened to shine. Tr. 113, l. 16 – 114, l. 8. This street light was not directly in front of his house, but across the road and a house down from Harrison's house. Tr. 125, ll. 8-17; 152, l. 18 – 153, l. 1. Harrison admitted that a picture of his driveway that night showed that it was pretty dark and that no street lights were visible in the picture. Tr. 156, l. 15 – 157, l. 10; * (Defendant's Exhibit No. 2 - Photograph).

Harrison also admitted at trial that despite testifying that this second person came through the bushes and flowerbed between his driveway and his neighbor's driveway, that he gave a statement to law enforcement the night of the incident which said the second person came "halfway up the driveway" – the pitch black driveway and not the bushes and flowerbeds where the second person would have been under the light of the street light. Tr. 163, l. 19 – 164, l. 19; * (Defendant's Exhibit No. 1 – Statement).

Harrison told law enforcement that this second person had run straight through the neighbor's yard going out of the neighborhood. Tr. 150, ll. 12-13. Harrison was not sure what time it was when this incident occurred, but he believed it was around 11:30 p.m. Tr. 113, ll. 12-15.

When law enforcement was called to the scene, Harrison said that absolutely no one asked him to describe the second person who ran away other than to ask the race of the person. Harrison told law enforcement that it was a white male who ran away through

the yard of his neighbor's house. Law enforcement did not ask Harrison if he could work with a sketch artist or participate in any type of lineup or identification process. Tr. 131, l. 5 – 133, l. 1.

Harrison said sometime after the shooting, he saw surveillance video images taken from Walmart on the news that showed two men and identified them as possible suspects in a crime. Harrison said Appellant was one of the men in the video. Even though Harrison said he recognized Appellant from the video, he did not immediately notify law enforcement of this fact. Instead, when Investigator Loren Williams called Harrison to let him know that police had arrested someone for the crime, Harrison then told Investigator Williams that he recognized on Appellant on the Walmart surveillance video released by the Sheriff's Department to the media. Tr. 133, l. 19 – 11; 147, l. 24 – 149, l. 18.

Erin Reid-Wise was the second person to testify at trial. She was working for Spartanburg County EMS the night of August 28, 2011. Tr. 166, ll. 4-17. She recalled responding to Harrison's house that evening. Tr. 166, ll. 22-24. The EMS station where Reid-Wise worked was located close to an intersection on Rainbow Lake Road with a Walmart and a Lowe's and was not far from Harrison's neighborhood. Tr. 167, l. 2 – 168, l. 14; 169, ll. 2-3.

When she and her partner received the dispatch call for the incident at Harrison's house, her partner got in the driver's seat of the truck and Reid-Wise sat in the passenger seat to navigate for the driver. While driving to Harrison's house, Reid-Wise looked out the windshield and "saw a white male standing across the street with no shirt on, dark colored pants . . ." Tr. 168, l. 21 – 169, l. 10. She testified that she only saw the man

standing there and she just assumed he was walking somewhere even though she never saw him moving. She said the man was "facing towards the Walmart." Reid-Wise said she did not notice anything distinctive about the man she saw. Tr. 178, l. 14 – 179, l. 21.

Reid-Wise could not identify Appellant as the man she saw walking that night because she was "not close enough to see his face." Tr. 171, l. 16 – 172, l. 1.

Reid-Wise also wrote up a statement to law enforcement which contained the following note: "Caller [Harrison] stated of a second suspect that ran off. Unsure of direction." Tr. 175, ll. 7-25.

Deputy Brian Fraley of the Spartanburg County Sheriff's Office worked as a K-9 handler for the department. His canine partner was a dog named Lando. On the night of August 28, 2011, Deputy Fraley and his dog were dispatched to the incident scene at Cottage Mill Run and Rainbow Lake Road to start a K-9 track from the entrance sign of the neighborhood. Deputy Fraley noted that the incident occurred at 10:43 p.m., he was notified and dispatched at 11:17 p.m., and he arrived on the scene at 12:04 p.m. Tr. 185, l. 17 – 187, l. 14.

Deputy Fraley testified that his dog was trained "to pick up on human scent that's left both from skin follicles and stuff falling from the body" and "[a]lso crushed vegetation or anything after it's been freshly stamped down." The dog is "given a command to start . . . to find the human scent, and once [the dog] does he will continue to track along human scent." Tr. 187, ll. 18-25.

Deputy Fraley testified that his dog did find a scent that evening. Deputy Fraley approached the entrance sign, and his dog was given a track command. Deputy Fraley testified:

> He [the dog] began to pull me along. There was a brick wall that was marking the entrance of the neighborhood. He pulled me along the brick wall in the grass, which is on the side of Rainbow Lake Road.
>
> We followed the wall until it stopped and he then turned right. Lando went a short distance until the . . . shrubs stopped. He then went toward -- we then went through the backyard of [a house on Carrington Drive.] We went through the backyard and toward the front yard of [the next house on Carrington Drive.] We went back onto the grass on the side of the - - Rainbow Lake Road. We continued on the grass until we got to a drainage ditch, which is actually inside the parking lot to Walmart on Rainbow Lake Road.
>
> Lando then made a right turn into the parking lot. We crossed the parking lot and went in front of the store. Lando went by the first entrance and then came to the second entrance to Walmart. At that time Lando actually turned to go into Walmart and I stopped him at that point due to he is trained for aggression work, and me not knowing who all was in the store. So, at that time I did stop my track at the entrance to Walmart.

Tr. 188, l. 1 – 189, l. 1.

Therefore, according to Deputy Fraley, there was a continuous track from Harrison's subdivision entrance to the door of Walmart. Tr. 189, ll. 2-7.

Deputy Fraley conceded though that based on his dog's tracking and Deputy Fraley's investigation, he had no way of identifying who may have made that particular track. His estimate of how old the track may have been was about an hour or two old since his dog was trained to alert on fresher tracks. Tr. 190, ll. 9-20.

On cross-examination, Deputy Fraley also acknowledged that his dog was not trained to sniff an item from a particular person – such as an article of clothing worn by a

particular person – pick up the scent of that person and then find the track of that particular person. Tr. 191, l. 20 – 192, l. 2.

Deputy Fraley conceded that while another type of dog trained to pick up scents of particular persons could have possibly picked up a scent of one of the persons riding in the vehicle Harrison saw near his driveway from the inside of the vehicle - a vehicle that was still parked at the scene of the incident following Harrison's shooting of the perpetrator – and tried to track the scent of the particular person riding in that vehicle, none of the dogs trained to do that type of tracking were working on the night of the incident. Tr. 192, l. 7 – 193, l. 16.

Deputy Fraley again admitted on cross-examination that his dog was not trained to smell an article of clothing from a particular person and then try to find a track for that particular person. His dog was only "trained to start at a known starting location and continue on that track until the end." Tr. 193, ll. 17-25. Deputy Fraley's dog could therefore only find a track of an unknown person and there was no way of specifying or identifying who made that track. Tr. 194, ll. 3-9.

Landon Bridges was an acquaintance of Appellant. Tr. 195, ll. 13-16. He saw Appellant on the evening of August 28, 2011, the night of the incident. Tr. 195, ll. 17-23. He testified that he saw Appellant at the Walmart on Rainbow Lake Road around 10:45 or 11:00 at night. Tr. 196, ll. 7-14.

Bridges said he went to Walmart that night to look at fishing equipment but he realized he did not have his wallet in his pocket so he walked back out to his car to get it. He said at that point Appellant approached him as he was going out the door and asked Bridges if he could give him a ride home to which Bridges agreed. Tr. 196, ll. 17-25.

Bridges said they drove around and smoked a marijuana blunt that Bridges had in his car. The two men then went back to Walmart looking for the fishing gear, then got back in the car, and Bridges then proceeded to take Appellant home. Bridges claimed that on the drive home, Appellant said something about "trying to hit a lick, and he shot him." Tr. 197, ll. 1-6; 202, l. 19 – 203, l. 8.

Bridges said he did not pay much attention to Appellant because he thought Appellant was just saying something to "look big." Bridges did not take Appellant seriously. Bridges dropped Appellant off, went home and went to bed, and woke up the next morning and noticed he had fifteen to twenty missed telephone calls from his family members saying that his picture was all over the news and paper. Tr. 197, ll. 7-12; 206, ll. 5-19.

Bridges said that he agreed with his mother to go to the Sheriff's Department to talk to someone. No one was at the department to speak with him. He said he left his name, address, and phone number but the Sheriff's Department never contacted him. Tr. 198, ll. 4-11.

Bridges thereafter only talked to the police after he was arrested on a number of charges including weapons possession and manufacturing, distribution, and possession of narcotics. While in jail, Bridges spoke to police and told him about his encounter with Appellant at Walmart. Tr. 198, l. 12 – 199, l. 3.

Bridges identified himself in some photograph stills taken from Walmart surveillance video footage. He said he was wearing a black shirt, and Appellant was wearing an olive shirt. Tr. 199, l. 9 – 201, l. 4; * (State's Exhibits 1, 2, 4, 5, 8, and 9 – Photographs). In the second set of pictures, Bridges testified that Appellant was wearing

a different shirt because while in the car, Appellant asked Bridges for a shirt to wear because his was dirty. Tr. 201, l. 7 – 202, l. 9.

On cross-examination, Bridges admitted that on the night of the incident, he was using methamphetamine. Tr. 210, l. 21 – 211, l. 5.

Investigator Loren Williams of the Spartanburg County Sheriff's Office responded to the scene on August 28, 2011 after the original call was dispatched at 10:43 p.m. He arrived around thirty minutes later. Tr. 212, l. 18 – 214, l. 4.

Investigator Williams testified that he developed Appellant as a suspect after he had gotten information from the K-9 track that there was a possibility that the suspect had run up Rainbow Lake Road to the Walmart. Tr. 215, l. 22 – 216, l. 4. One of the Sheriff's Department's uniform patrol deputies went to Walmart and was able to locate a plain clothes loss prevention employee of Walmart. The deputy went into the security office with the Walmart loss prevention employee and watched the surveillance video. On the video, they saw an individual come into Walmart and then leave with the individual now known as Landon Bridges. Investigator Williams admitted that they "really and truly . . .didn't know if they [the two men on the video] had anything to do with it [the attempted robbery at Harrison's house.]" Tr. 216, ll. 3-13.

Investigator Williams had still photographs taken of the two men from the Walmart surveillance video footage and "had done what we call a person of interest request that was sent to the media." Therefore, two of these pictures showed up on the news as persons of interest in the attempted robbery on Cottage Mill Run. Tr. 216, ll. 14-21.

Investigator Williams was later notified that Bridges was in the county jail and might have some information on the Cottage Mill Run robbery, and Bridges, who did not know Appellant's last name, told Investigator Williams where Appellant lived and also described Appellant has having a large quantity of tattoos. Tr. 216, l. 22 – 217, l. 15. Investigator Williams learned Appellant's last name from Appellant's landlord and was able to get a picture of Appellant from either the Department of Motor Vehicles or previous mugshots. Bridges then identified Appellant as the person with him at Walmart on the night of the incident, and Investigator Williams then sought a warrant for Appellant on attempted armed robbery. Tr. 217, l. 15 – 218, l. 12.

On cross-examination, Investigator Williams testified that the blue vehicle that was out in the roadway in front of Harrison's house – the vehicle in which Harrison believed the assailants had arrived – was processed for fingerprints and other forensic evidence. Tr. 221, l. 23 – 223, l. 24. The blue car was registered to Fowler, the deceased individual shot by Harrison. Tr. 223, ll. 9-11.

There was absolutely no forensic evidence of any kind developed from this blue car that could be tied back to Appellant. Tr. 223, ll. 17 – 24. There were no fingerprints of Appellant found in the blue vehicle. There were no other forensic materials found in the vehicle that could be connected to Appellant. Tr. 223, l. 25 – 224, l. 6.

Investigator Williams could not explain why he did not ever try to get a description from Harrison of the second assailant and acknowledged that was a mistake on his part. He acknowledged just assuming on his part that they were looking for a white male. Tr. 224, ll. 7 – 23.

Investigator Williams also admitted that the surveillance video from Walmart had disappeared, and he could not explain where it had gone. Tr. 227, ll. 21-25. He testified that he knew the video was collected and taken to the office, that the video was reviewed and still photographs were taken from the video, but that he had no documentation of who put the video into evidence. Tr. 228, ll. 1-7. Investigator Williams conceded that other than the few pictures law enforcement decided to print from the video, there was now no way of knowing how many white males of similar build to Appellant went in and out of the Walmart on the evening of August 28, 2011. Tr. 228, ll. 12-18.

Alexandria Schubert, Appellant's fiancée, testified for the defense. Tr. 232, ll. 5-25. On August 28, 2011, she and Appellant were living together in a duplex about a mile and a half from the Walmart. Tr. 235, ll. 1-6. Appellant had a job working on a horse farm with Chuck Marshall. She and Appellant did not own a vehicle. Appellant's boss would pick him up to take him to work. Tr. 233, l. 23 – 235, l. 14.

Appellant worked at the horse farm that Sunday, August 28, 2011. Schubert said Appellant came home wearing his work clothes and work boots. She could not recall exactly what time Appellant came home from work that day. Tr. 236, ll. 2-15.

Schubert testified that Appellant left the duplex around 10:15 or 10:30 that night to meet a guy to buy some marijuana. Appellant was going to meet the seller at the Walmart. Tr. 236, ll. 16-25. Schubert said that Appellant walked to the Walmart to meet up with the seller. She said that they regularly walked to the Walmart. Tr. 237, ll. 5-8.

Schubert said Appellant returned from Walmart about forty-five minutes later. Appellant was driven back to the house by Landon Bridges. Tr. 238, ll. 1-17. Bridges

and Appellant stood outside of the front of the duplex and smoked a joint. At little later, Bridges and Appellant left again because Bridges was supposed to go pick up something at the Walmart. Tr. 239, ll. 3-25.

Schubert said when Brides and Appellant left again in Bridges' car, she noticed that Appellant forgot to take his shirt with him because he never wears his shirt. Tr. 240, ll. 6 – 20. Appellant left his shirt lying on the porch. Tr. 241, ll. 8-9.

Bridges and Appellant were gone on this second trip to Walmart for about fifteen or twenty minutes. When they came back, Bridges just dropped Appellant off at the duplex and did not get out of his car. Tr. 241, ll. 12-19.

Schubert said that at no time that evening did Appellant seem upset, aggravated, or nervous. He did not mention to Schubert any problem or trouble that he may have had that evening. Tr. 241, l. 20 – 242, l. 3.

Schubert also said that Appellant has several distinctive tattoos. He has a big balloon tattoo on his chest, as well as a tattoo down his arm and tattoos on his neck. Schubert said that these tattoos would be visible from across the room if Appellant was not wearing a shirt. Tr. 245, l. 19 – 246, l. 11. This testimony was important because Erin Reid-Wise, the EMT who observed a white male with no shirt on standing on the side of the road facing the Walmart, testified that she did not notice anything distinctive about the man she saw. Tr. 169, ll. 4-10; 179, ll. 5-6, 14-20.

ARGUMENT

I. The Trial Court erred in refusing to exclude evidence that a police dog tracked a human scent from the entrance of the attempted robbery victim's neighborhood to a Walmart where this dog track could not be connected to Appellant and therefore was irrelevant and inadmissible at trial.

During pre-trial motions, Appellant moved to suppress all evidence regarding the K-9 track from the entrance of Harrison's neighborhood to the entrance of the Walmart where such evidence was not relevant because the scent tracked by the dog could not be tied to Appellant. Tr. 21, l. 13 – 24, l. 15; 41, l. 10 – 44, l. 11.

During the pre-trial in camera hearing, Deputy Fraley testified that he was advised by on-scene officers to start a track at the entrance sign of the neighborhood because it was the last place that a person was seen running that was uncontaminated by other people that were on the scene of the shooting and attempted robbery. Tr. 25, l. 15 – 26, l. 22. Deputy Fraley's dog tracked a human scent from the entrance of the subdivision to the Walmart. Tr. 27, ll. 2 – 25. Deputy Fraley testified that the distance from where the track began to the Walmart was approximately five hundred to six hundred yards – less than a mile away. Tr. 27, ll. 23-25.

Deputy Fraley admitted that he had no idea how many people lived in the subdivision and had no idea how many individuals from that subdivision may have walked from the subdivision to the Walmart that day. Tr. 28, l. 16 – 29, l. 8. Deputy Fraley also admitted that the fact that his dog tracked a scent from the entrance sign of the neighborhood to the Walmart in no way whatsoever told him whose track the dog was following. Deputy Fraley had absolutely no way to tie the K-9 track to Appellant. Tr. 30, ll. 1-8.

Appellant argued that under the definition of relevance, the evidence had to either prove or disprove a matter at issue and "the fact that this dog followed a track from a point at this scene to Walmart in no way ties [the track] to [Appellant.] Tr. 41, ll. 12-18. The Trial Court disagreed, ruling that he saw no reason to exclude the dog track evidence. Tr. 44, ll. 4-5.

Under Rule 401, SCRE, 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." Evidence which is not relevant is not admissible. Rule 402, SCRE.

The dog track evidence was irrelevant at trial where the dog track could not be linked to Appellant. Deputy Fraley conceded that the dog track could not be traced to any particular individual, much less Appellant. At most, the dog track evidence established that someone who had been in Harrison's subdivision walked from the entrance of the subdivision to the Walmart which was less than a mile away. This could have been anyone – anyone that lived in the subdivision or anyone that walked by the entrance of the subdivision on the way to the Walmart.

The Trial Court should have excluded the dog track evidence on the basis that it was irrelevant. See State v. Starnes, 340 S.C. 312, 323-24, 531 S.E.2d 907, 913-14 (2000) (holding an inmate's testimony concerning allegations the prosecution had attempted to procure false testimony was irrelevant and inadmissible where the evidence neither established the prosecution actually presented perjured testimony at appellant's trial nor impeached the testimony of the four inmates who testified in reply as the inmate did not state the prosecution had attempted to procure false testimony from them); Hollins v. Wal-

Mart Stores, Inc., 381 S.C. 245, 252-53, 672 S.E.2d 805, 808-09 (Ct. App. 2008) (holding police officer's testimony concerning discount department store employee's prior arrest for exposing himself in front of two young girls, in negligent hiring and retention action, was irrelevant and inadmissible as plaintiff mother failed to demonstrate that defendant store knew of the prior arrest or should have known about it).

This State's Supreme Court has set forth a framework for the admissibility of dog tracking evidence. A sufficient foundation for the admission of dog tracking evidence is established if "(1) the evidence shows the dog handler satisfies the qualifications of an expert under Rule 702; (2) the evidence shows the dog is of a breed characterized by an acute power of scent; (3) the dog has been trained to follow a trail by scent; (4) by experience the dog is found to be reliable; (5) the dog was placed on the trail where the suspect was known to have been within a reasonable time; and (6) the trail was not otherwise contaminated." State v. White, 382 S.C. 265, 272, 676 S.E.2d 684, 687 (2009).

While the Supreme Court set forth the threshold foundational requirements of qualifications and reliability for dog tracking evidence in White, such dog tracking evidence must still be relevant to the issues at trial. In other words, a dog might be experienced, reliable, and trained by a professional, thereby meeting the foundational requirements, but if the circumstances of the dog's trailing fail to show that what it did was connected to the case, the evidence is irrelevant and therefore inadmissible.

Here, all that is known is that Deputy Fraley's dog tracked an unknown human scent from the entrance of a neighborhood to a busy Walmart less than a mile away from the neighborhood. This scent may not have belonged to Appellant at all or the dog could have picked up Appellant's scent from when Appellant walked from his own house to Walmart

as his fiancée Alexandria Schubert testified that he did that night and as the two of them did regularly. Tr. 237, ll. 5-8. This dog tracking evidence cannot connect Appellant to the attempted robbery at Harrison's house and should have been excluded at trial.

The admission of the dog tracking evidence was not harmless. There was no competent evidence connecting Appellant to the shooting and attempted robbery at Harrison's house. There was no evidence at trial suggesting that Fowler, the deceased individual, and Appellant had any connection. There was no forensic evidence found in Fowler's blue vehicle that could be traced to Appellant. Tr. 223, l. 17 – 224, l. 6 The only evidence connecting Appellant to the scene was Harrison's post-incident identification of Appellant after he saw the photograph stills taken from the Walmart surveillance video on the news, which as discussed in the next issue, was highly suspect in and of itself. Accordingly, where the dog tracking evidence was irrelevant and inadmissible, Appellant is entitled to a new trial.

II. The Trial Court erred in admitting the witness's in-court identification of Appellant where the witness only identified Appellant after the witness observed still photographs of Appellant taken from the Walmart surveillance video which law enforcement distributed to the media naming the individual in the photographs as the person of interest in the attempted robbery where this procedure was unduly suggestive and inherently unreliable.

During pre-trial motions, Appellant moved to suppress any in-court identification made by Harrison of Appellant as the second assailant because of the unduly suggestive identification procedure and the resulting unreliability of the identification. The Trial Court denied this motion, ruling there was no "State sponsorship or activity involved in the identification." Tr. 52, l. 14 – 83, l. 7.

Following the attempted armed robbery at Harrison's house, one of the Sheriff's Department's uniform patrol deputies went to Walmart and watched the surveillance video from that night with a Walmart loss prevention employee. On the video, they saw an individual come into Walmart and then leave with the individual now known as Landon Bridges. Investigator Williams admitted that they "really and truly . . .didn't know if they [the two men on the video] had anything to do with it [the attempted robbery at Harrison's house.]" Tr. 216, ll. 3-13.

Investigator Williams had still photographs taken of the two men from the Walmart surveillance video footage and "had done what we call a person of interest request that was sent to the media." Therefore, two of these pictures showed up on the news as persons of interest in the attempted robbery on Cottage Mill Run. Tr. 216, ll. 14-21. The Sheriff's Office was the entity that released these photographs to the media. Tr. 52, l. 15 – 53, l. 3. Therefore, contrary to the Trial Court's ruling, the State had

direct involvement with releasing the still photographs of Appellant to the media and identifying Appellant as a person of interest in the attempted robbery at Harrison's house.

The procedure used by the State was just as improper as a suggestive line-up. Tr. 54, l. 20 – 55, l. 2. During his in camera testimony, Harrison testified that he came "to know the man that [he] saw in [his] driveway that night" as Appellant after he saw the photograph stills from the Walmart video footage on the news. Tr. 58, ll. 17-21; 61, ll. 20-21.

Harrison also testified that on the night of the event, law enforcement never asked him for any description of the suspect. Harrison never told law enforcement that he got a good look at the suspect and could try to identify or describe him. He admitted that his mind was very "scrambled" right after he had shot and killed the first individual who came up to his car. Tr. 59, l. 22 – 61, l. 5; 131, l. 5 – 133, l. 1.

In United States v. Russell, 532 F.2d 1063, 1066-67 (6th Cir. 1976), the United States Court of Appeals for the Sixth Circuit observed, "[t]here is a great potential for misidentification when a witness identifies a stranger based solely upon a single brief observation, and this risk is increased when the observation was made at a time of stress or excitement . . . . This problem is important because of all the evidence that may be presented to a jury, a witness' in-court statement that 'he is the one' is probably the most dramatic and persuasive."

Here, Harrison only briefly observed the second assailant under disputed conditions of whether the second assailant was standing under enough street light for Harrison to clearly see him. Tr. 57, l. 25 – 58, l. 10; 63, l. 13 – 67, l. 6; 72, l. 9 – 81, l. 15; * (Defendant's Exhibit No. 3 – Photograph). Harrison admitted that his mind was

"scrambled" right after he shot and killed the first assailant and right before he observed the second assailant. He gave no description to law enforcement that night of the second assailant other than to say he was a white male. It was not until Harrison saw the still photographs of Appellant that law enforcement released to the media identifying Appellant as a person of interest in the attempted robbery that Harrison was able to identify Appellant. The procedure used by the State was very much like a suggestive, single photo lineup.

"A criminal defendant may be deprived of due process of law by an identification procedure arranged by police which is unnecessarily suggestive and conducive to irreparable mistaken identification." State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004). An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification. Manson v. Brathwaite, 432 U.S. 98 (1977)

The United States Supreme Court has developed a two-prong inquiry to determine the admissibility of an out-of-court identification. Neil v. Biggers, 409 U.S. 188 (1972). First, a court must ascertain whether the identification process was unduly suggestive. State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000). The court must next decide whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. *Id.*

In State v. Liverman, 398 S.C. 130, 727 S.E.2d 422, 426 (2012) the South Carolina Supreme Court wrote:

> In Neil v. Biggers, the United States Supreme Court set forth a two-pronged inquiry to determine whether due process requires suppression of an eyewitness

> identification. Due process requires courts to assess, on a case-by-case basis, whether the identification resulted from unnecessary and unduly suggestive police procedures, and if so, whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Biggers, 409 U.S. at 198, 93 S. Ct. 375. Under the totality of the circumstances, the factors to be considered in assessing the reliability of an otherwise unduly suggestive identification procedure are: (1) the witness's opportunity to view the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. Manson v. Brathwaite, 432 U.S. 98, 114, 97 S. Ct. 2243, 53 L.Ed.2d 140 (1977) (citing Biggers, 409 U.S. at 199–200, 93 S. Ct. 375).

Single person show-ups are particularly disfavored in the law. Stovall v. Denno, 388 U.S. 293 (1967) (practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned); see also State v. Johnson, 311 S.C. 132, 134, 427 S.E.2d 718, 719 (Ct.App.1993) (single person show-ups are particularly disfavored in the law).

While law enforcement did not use a single person show-up here, what law enforcement did in this case was really no different where law enforcement released the still photographs of Appellant to the media and identified Appellant as a person of interest before Harrison had given law enforcement any description of the second assailant.

Under the factors set forth in Biggers and under the totality of the circumstances, the identification procedure used by the State was unduly suggestive where (1) Harrison only had a limited opportunity to view the perpetrator at the time of the crime; (2)

Harrison was admittedly rattled when he observed the second perpetrator after he had just shot and killed another perpetrator; and (3) Harrison gave no description to law enforcement of the second perpetrator other than to say he was a white male so there is no way to determine the accuracy of Harrison's prior description of the perpetrator compared with the identification of Appellant by Harrison based upon the still photographs released by law enforcement. The identification of Appellant by Harrison was not so reliable such that there was no substantial likelihood of misidentification, and Appellant is entitled to a new trial where the Trial Court should have suppressed Harrison's in-court identification of Appellant.

III. Where the State lost or destroyed the Walmart surveillance video, the Trial Court was required to either dismiss the indictment against Appellant or suppress all evidence relating to the Walmart surveillance video footage, including the photograph stills taken from the video and the witness's identification of Appellant from the photograph stills released to the media by the State, where the surveillance video possessed an exculpatory value apparent before the evidence was destroyed and Appellant cannot obtain other evidence of comparable value by other means.

As a part of its investigation, the State obtained surveillance video footage from Walmart from the night of August 28, 2011 and printed out photograph stills of two men, Bridge and Appellant, entering the store. The surveillance video was thereafter lost or destroyed by the State. Tr. 51, ll. 6-19; 216, ll. 3-21; 227, l. 21 – 228, l. 18. Neither Solicitor Fulmer nor Investigator Williams could explain what happened to this video. Tr. 52, ll. 5-13; 227, l. 21 – 228, l. 7.

Defense counsel argued to the Trial Court that this surveillance video was exculpatory evidence which should have been turned over to the defense by the State. The video could have very well created an alibi for the Appellant because he could have been in the store at the time of the shooting and attempted robbery at Harrison's home. The photographic stills taken from the video only contained handwritten notes by someone indicating the time of the photographs. The video would have showed the actual time stamp when Appellant entered the Walmart. Tr. 51, ll. 14-24.

In addition, because the State lost the Walmart surveillance video, Appellant was deprived of the ability to use the video to show how many other people, including white males, went into the Walmart that night. Tr. 253, ll. 5-10; 266, ll. 1-7. Investigator Williams conceded that because the State only chose to print out a few pictures of Bridges and Appellant and thereafter lost the Walmart surveillance video, there was now no way of

knowing how many white males of similar build to Appellant went in and out of the Walmart that night. Tr. 228, ll. 12-18.

In deciding to at least give a spoliation of evidence charge, the Trial Court observed that the "evidence [the surveillance video] was in possession of the State at some point in time, in the possession of the police at least, and that it was not, in fact preserved and was not produced under Rule 5." Tr. 257, ll. 21-25. The Trial Court further agreed that the video could have been of some use to the defense to establish the number of people of similar description that may have entered the Walmart at the same time and therefore had some exculpatory value. Tr. 258, ll. 3-8.

Appellant's due process rights were violated when the State prosecuted him after destroying material exculpatory evidence and the case should have been dismissed or at a minimum, the Trial Court should have suppressed all evidence relating to the Walmart surveillance video footage, including the photograph stills taken from the video and Harrison's identification of Appellant from the photograph stills released to the media by the State.

In State v. Cheeseboro, this Court held that to establish a due process violation when useful evidence is destroyed by the State, the defendant must demonstrate:

> (1) that the State destroyed the evidence in bad faith, or
>
> (2) that the evidence possessed an exculpatory value apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means.

346 S.C. 526, 538-39, 552 S.E.2d 300, 307 (2002).

While the State may not have destroyed the Walmart surveillance video in bad faith, the video no doubt possessed exculpatory value as both the Trial Court and Investigator

Williams agreed. The State's lack of care in ensuring that the Walmart surveillance video was preserved severely undermined Appellant's defense. There was no way for Appellant to obtain this video after the State either destroyed or lost it.

Defendants are to be given a meaningful opportunity to present a complete defense. "In this regard, defendants have the right to request and obtain from the prosecution evidence that is material to the guilt of the defendant or relevant to the punishment to be imposed. Even absent a request, prosecutors have a constitutional duty to give the defendant exculpatory evidence which would raise a reasonable doubt about his guilt." State v. Jackson, 302 S.C. 313, 314-15, 396 S.E.2d 101, 102 (1990) (citing Brady v. Maryland, 373 U.S. 83 (1963); United States v. Agurs, 427 U.S. 97 (1976)).

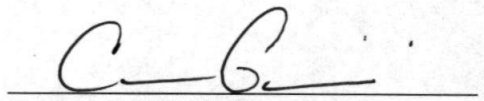
In Jackson, the prosecution of a defendant after charges had been originally dismissed and a videotape of defendant performing field sobriety tests had been erased was held by the South Carolina Supreme Court to violate due process. Here, in Appellant's case, the evidence was destroyed while the investigation was pending, not merely after the fact as in Jackson. There, as here, the defendant could not obtain evidence of comparable value. Id. at 316, 396 S.E.2d at 102.

Under these circumstances, the case against Appellant should either be dismissed or Appellant should receive a new trial and all evidence relating to the Walmart surveillance video footage be suppressed.

CONCLUSION

For the reasons set forth herein, Appellant Christopher Emmons requests this Court to reverse his conviction for attempted armed robbery and either (1) dismiss the indictment against him; or (2) remand the case for a new trial.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of June, 2014.

(5)

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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
Roger L. Couch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CHRISTOPHER LEE EMMONS,

APPELLANT.

APPELLATE CASE NO. 2013-002018

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;
(1) Transcript of trial held September 11-13, 2013 (designated pages only): 1-7; 21-83; 103-180; 182-229; 232-242; 245-246; 252-258; 261-284; and 308-318;
(2) State's Exhibits 1, 2, 4, 5, 8, and 9 (photographs);
(3) Defendant's Exhibit 1 (Statement);
(4) Defendant's Exhibits 2 and 3 (Photographs); and
(5) Sentencing Sheet.

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

June 4th, 2014.

Carmen V. Ganjehsani
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
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STATE OF SOUTH CAROLINA
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THE STATE,

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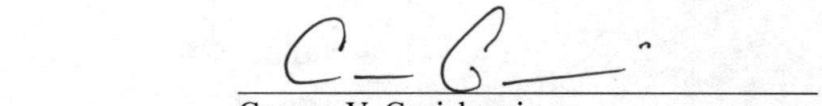
CERTIFICATE OF SERVICE

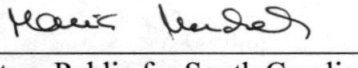
The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Christopher Lee Emmons, #357044, Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 4th day of June, 2014.



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 4th day of June, 2014.


(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.