

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Sumter County

William Jeffrey Young, Circuit Court Judge

RECEIVED
JUL 10 2014
SC Court of Appeals

JEREMY SMITH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000146

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS	1
TABLE OF AUTHORITIES	2
STATEMENT OF ISSUE ON APPEAL	3
STATEMENT OF THE CASE	4
ARGUMENT	5
CONCLUSION.....	17

TABLE OF AUTHORITIES

Cases

<u>Arizona v. Youngblood</u> , 488 U.S. 51 (1988).....	3, 5, 13, 14
<u>Brady v. Maryland</u> , 373 U.S. 83 (1963)	3, 5, 13, 14
<u>Gibson v. State</u> , 334 S.C. 515, 514 S.E.2d 320 (1999)	14
<u>Riddle v. Ozmint</u> , 369 S.C. 39, 631 S.E.2d 70 (2006)	13
<u>State v. Forrester</u> , 343 S.C. 637, 541 S.E.2d 837 (2001).....	13
<u>State v. Jackson</u> , 302 S.C. 313, 396 S.E.2d 101 (1990)	5
<u>State v. Kromah</u> , 401 S.C. 340, 737 S.E.2d 490 (2013)	13
<u>State v. Mabe</u> , 306 S.C. 355, 412 S.E.2d 386 (1991).....	14
<u>State v. Moses</u> , 390 S.C. 502, 702 S.E.2d 395 (2010).....	6, 13, 14
<u>State v. Tufts</u> , 355 S.C. 493, 585 S.E.2d 523 (Ct. App. 2003)	13

STATEMENT OF ISSUE ON APPEAL

Whether the court erred by failing to suppress testimony concerning what several witnesses allegedly observed on a video recording from a security camera system at a convenience store since the state failed to preserve a copy of the footage and turn it over to the defense pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) and *Arizona v. Youngblood*, 488 U.S. 51 (1988)?

STATEMENT OF THE CASE

A Sumter County Grand Jury indicted Appellant at the December 2009 term of General Sessions for second degree burglary (violent). R. *. His case was called to trial on January 15, 2014 before the Honorable W. Jeffrey Young, and a jury. Tr. 1. Assistant Solicitor Michael McMullen appeared on behalf of the state, and Stephen Story represented Appellant. Tr. 1.

At the conclusion of the trial, the jury found Appellant guilty. Tr. 140, ll. 3-15. Judge Young sentenced him to ten years imprisonment. Tr. 152, ll. 5-7.

This appeal follows.

ARGUMENT

The court erred by failing to suppress testimony concerning what several witnesses allegedly observed on a video recording from a security camera system at a convenience store since the state failed to preserve a copy of the footage and turn it over to the defense pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) and *Arizona v. Youngblood*, 488 U.S. 51 (1988).

Motion to Suppress

Appellant moved pretrial to suppress any testimony concerning what several witnesses allegedly observed on a video recording from a security camera system at a convenience store since the state failed to preserve a copy of the footage and turn it over to the defense. Defense counsel explained, “[E]ver since we received the discovery, we were told that there was a videotape taken from Young’s Market.” However, it was not until two days before trial that defense counsel was finally told “there was no videotape.” Tr. 23, ll. 3-11. Defense counsel told the court that he and Appellant “were waiting to watch this videotape so we would know what to do going forward.” Tr. 25, ll. 16-20.

Appellant argued the state’s failure to preserve the surveillance video and provide a copy to the defense was a denial of his due process rights under Brady. He also argued it was a denial of his due process rights under Youngblood because law enforcement acted in bad faith by failing to preserve the video footage when it knew it contained material evidence and because the video contained exculpatory evidence, specifically it showed Appellant was not the burglar. Defense counsel cited State v. Jackson, 302 S.C. 313, 396 S.E.2d 101 (1990), in support of his position. Tr. 25, l. 7 – 27, l. 17.

The solicitor argued in response, “State versus Moses¹ addresses an issue much like this. And citing Arizona versus Youngblood, they [the court] said while recognizing the State does not possess an absolute duty to preserve potentially useful evidence, our State Supreme Court has held a defendant must demonstrate the State destroyed the evidence in bad faith or the State destroyed evidence that possessed an exculpatory value. And that must be apparent before the evidence was destroyed. And I just don’t think we have that here. If anything, it [the video] was inculpatory.” Tr. 27, l. 19 – 28, l. 4.

Appellant called the evidence custodian from the Sumter County Sheriff’s Office, James Atkinson, to the stand in support of his motion. Atkinson testified that he started working at the Sheriff’s Office in September 2010 and that he “never [saw] the tape” because “[i]t was there before I got there, so I’ve never seen it.”² Tr. 29, ll. 6-18.

Appellant also called Sergeant Melissa Addison, the lead investigator on the case, to the stand. Addison testified that one of the original responding officers collected “the surveillance tape.” She later clarified that the “evidence receipt” states a “DVD . . . was placed into evidence.” Addison explained, “There was a tape I did view actually in the store [Young’s Food Store] and also some attempt to view some of it on the DVD, but we were unable to.” She said she viewed the tape in the store “a day or so after the incident occurred” with the store clerk. After questioning by defense counsel, Addison clarified that she viewed the surveillance footage on the “system,” not on an actual tape. Tr. 30, l. 9 – 33, l. 8.

¹ State v. Moses, 390 S.C. 502, 702 S.E.2d 395 (2010)

² The burglary at Young’s Food Store occurred on September 13, 2009.

The state then called Jennifer Vandegrift, the assistant manager of Young's Food Store at the time of the burglary, to the stand. Vandegrift explained, "At all Young's Markets, there is a recording system back in the manager's area. And that is a DVD system that is activated at night when a motion sensor is triggered in the store. It automatically turns the cameras on. Now, with those cameras, you can go back up to thirty days before it [the system] wipes the memory. Within those thirty days, you can view it [the footage]. You can also burn it to a DVD." Tr. 34, l. 1-17. Vandegrift claimed that she attempted to make a copy of the video footage from the surveillance system, but "her best efforts failed." Tr. 35, ll. 1-4. She later clarified that she "believed" she had burned a copy of the video onto a DVD, but admitted "[t]here could have been an issue when it recorded with the lasers." Tr. 36, ll. 8-14.

When questioned by the court, Vandegrift said that she watched the video footage from the night of the burglary with Sergeant Addison and claimed Appellant was on the video. Tr. 35, ll. 7-13.

The court ultimately ruled, "I find that the loss of the photographic array [sic] does not violate the Defendant's due process rights. In light of the totality of the evidence, the photographic array [sic] does not amount to any type of material or exculpatory evidence to which the Defendant is constitutionally guaranteed access. Moreover, the Defendant failed to present any real credible evidence of bad faith on the part of the police. And that is required by South Carolina law in the showing of a due process violation. So the witnesses will be able to explain what they saw on the videotape. So your motion is respectfully denied." Tr. 37, ll. 6-17.

Evidence at Trial

Jennifer Vandegrift, the assistant manager at Young's Food Store on September 13, 2009, was the first witness to testify in front of the jury. Tr. 54, ll. 18-20. She testified that the convenience store was opened from 6:00 am until 11:00 pm every day. Vandegrift explained, "The security system that was used by Young's Markets at that time was a series of different cameras that worked together called channels on your view screen. You would have a flat screen monitor in the back at the manager's area, and you had nine to twelve cameras that you could view simultaneously. They were all motion-sensor activated. So the camera only recorded when something was moving in its frame." She also explained that "you could view any camera recordings up to thirty days back before the memories would wipe" and that one could burn the recordings onto a DVD within that thirty day period. Tr. 55, l. 3 – 56, l. 25.

Vandegrift testified that around 2:30 am on September 13, 2009, she received a telephone call from "the alarm company" who told her that the motion sensors on the security cameras at Young's had been activated, that "[t]hey had pulled the camera feed . . . , and we had had a break in." She said that she was the second person the alarm company called, the first being her boss, Brandy Tilghman. Tr. 57, l. 5 – 58, l. 1. The alarm company had also notified law enforcement. Tr. 58, ll. 6-10.

Vandegrift said that when she arrived at the store around 3:00 am, Tilghman and several law enforcement officers were already on scene. She claimed the "front door was busted" and that a large, irregularly shaped piece of asphalt was used to break the glass. Tr. 58, l. 16 – 60, l. 3. Vandegrift testified that upon entering the store, she "noticed immediately all the Newport menthol cigarettes were gone as were a good many of the blunt

wraps and the cigars.” Tr. 60, ll. 5-11. After observing what was stolen, Vandegrift, Tilghman, and an officer went to review the recording from the surveillance cameras. Tr. 60, ll. 12-16.

Vandegrift testified that the footage from the security cameras showed a man walk up to the front door of the store from the side of the building. Once there, the man looked in and out of the store window, watched traffic, and then “back[ed] up and thr[e]w the piece of asphalt at the door to bust it.” Vandegrift claimed that she did not recognize the man until he entered the store. She said, “There is another camera that is situated directly above where the cashier would stand so that you can see any transaction and any person’s face as they come to the counter. It was at that point when that camera picked up that we saw his face because he looked up directly at the camera.” Tr. 60, l. 18 – 61, l. 22.

Vandegrift claimed that she recognized the burglar and that “[h]e had been a regular at our store. He came in once, maybe twice a day, almost every single day.”³ She said, “What stuck out in my mind the most and what made it so easy to remember his face is he had what they call a grill - - it was gold - - that he wore over his teeth.” Tr. 62, l. 6 – 63, l. 4. However, Vandegrift did not know the man’s name. She explained, “[W]e waited for him to come back to the store because we knew that he would. And it just so happens that he came in on my shift and wanted to buy a blunt wrap. So I carded him and remembered his name.” She said she wrote his name and address on her hand and then contacted law enforcement and gave them the information. Tr. 64, ll. 2-14.

³ However, Vandegrift clarified the customer, who she claimed was also the burglar on the video, had only been coming to the store for approximately three weeks to a month. Tr. 63, ll. 17-20.

Vandegrift later identified Appellant in the courtroom as the man she saw on the surveillance cameras. Tr. 63, ll. 8-15.

Furthermore, Vandegrift explained, “[W]e were told to burn the DVD from the recorded memory of the security system onto an external device. We followed that procedure, burned the disk, and turned it over to the officer.” She said they burned the footage directly from the system’s hard drive onto the DVD. However, she admitted, “[W]e were unsure whether or not the efforts would be successful because we had had issues with the laser on that machine that burns it.” Despite these concerns, Vandegrift did not review the DVD to make sure the footage properly burned onto the disc and, after thirty days had passed, the hard drive automatically erased the footage. Tr. 68, l. 5 – 69, l. 13.

Brandy Tilghman, the store manager at Young’s Food Store at the time of the burglary, also testified she was notified by the alarm company “that the sensors had gone off and that there had been a break-in.” She said when she arrived at the store shortly thereafter she noticed that the glass panel on the left front door had been shattered and that all the Newport cigarettes and several cigars had been stolen. Tr. 75, l. 14 – 76, l. 24.

Tilghman explained, “We had a live video feed that went through a DVD player, and it held all surveillance for thirty days. We had several different cameras. And so when you look at the monitor, there was probably about ten different screens you could see from every different angle.” She added that the cameras were “motion sensed” to conserve energy. She, Vandegrift, and a law enforcement officer watched the “live feed” together. According to Tilghman, “[y]ou could see a black male approach the front door. He looked around for a minute. He threw the rock through the left door . . . and immediately went in. Looked like he had a black backpack with him. He went straight for the cigarettes, almost

like he knew exactly what he wanted. Went straight to the cigarettes, loaded up with the Newports. Didn't touch any other cigarettes. Loaded up those, several cartons and some cigars and then went right back out." Tr. 78, l. 16 – 79, l. 25.

Tilghman claimed she "g[ot] a good look at the person who broke into the store" and that she recognized him as a customer. However, she said she did not know his name, but "just knew he had been in our store a few times." She then identified Appellant in the courtroom as the man that appeared on the surveillance footage. Tr. 81, ll. 7-20. She further explained, "[W]hat caught our attention at the front door was he [the burglar] had a grill in his mouth, and that made him stick out . . . , especially when he frequented our store. It's not very often you see someone with a grill." Tr. 82, l. 24 – 83, l. 4.

Tilghman claimed she made efforts to preserve the video evidence. She explained, "[W]hat you do is put a DVD, a blank DVD in to the system and you tell it which cameras to record, what time and dates. And it's supposed to automatically download onto the disk. We did have an investigator come to get a copy, and we did download it onto a disk." She said she never watched the DVD to make sure the recording properly burned onto the disk and that after thirty days had passed you could no longer view the footage on the system's hard drive. Tr. 84, l. 20 – 85, l. 25.

Sergeant Melissa Addison, the lead investigator on the case, was the last witness to testify. She explained that she was not the on-call investigator on the morning of September 13, 2009 and therefore she did not initially respond to the scene. However, she went to Young's the following day and viewed the surveillance video. Addison admitted that she did not recognize the burglar. She said, "I didn't know who he was, so I couldn't say. Never met him, didn't know him. But you could clearly see the individual on the

videotape.” She also claimed the man on the surveillance footage had a “grill” in his mouth. Tr. 97, ll. 1-16.

Addison testified that law enforcement eventually received a telephone call from the manager who maintained that the individual who appeared on the footage had returned to the store and that she was able to obtain his name and address. Tr. 97, l. 22 – 98, l. 5. On September 19, 2009, Addison went to the address provided by the manager and arrested Appellant. She claimed that when she arrested him, Appellant had a grill in his mouth, which she subsequently placed into evidence.⁴ Tr. 97, ll. 16-21; Tr. 99, ll. 16-17. Addison identified Appellant in the courtroom as the man she observed on the surveillance video. Tr. 91, ll. 15-21.

Additionally, Addison testified that she “did not receive the disk. The responding officer actually obtained the disk [from the store manager] and placed it into evidence.” Tr. 96, ll. 10-14. She claimed she did “[n]othing to tamper with [the DVD]” and attempted to retrieve the footage from the disk, but “just wasn’t able to.” Tr. 98, ll. 16-25. She maintained there was “nothing on it [the disk].” Tr. 96, ll. 15-17.

Appellant renewed his motion to suppress all testimony concerning the contents of the unpreserved video due to the violation of Appellant’s due process rights at the end of the

⁴ This grill was identified by Vandegrift and Tilghman during their testimony and admitted into evidence as a state’s exhibit. See Tr. 65, l. 23 – 66, l. 4; see also Tr. 82, l. 24 – 83, l. 12.

state's case in chief. Tr. 105, l. 19 – 106, l. 3. He also renewed his motion after the defense rested. Tr. 113, ll. 3-11.⁵

Discussion

The court erred by failing to suppress the testimony concerning what several witnesses allegedly observed on the video recording from the security camera system at Young's Food Store since the state failed to preserve a copy of the footage and turn it over to the defense pursuant to Brady and Youngblood.

“The suppression by the [State] of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment.” Moses, 390 S.C. at 515, 702 S.E.2d at 402 (citing Brady, 373 U.S. at 87). “In South Carolina, an individual asserting a *Brady* violation must demonstrate that the evidence: (1) was favorable to the accused; (2) was in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence or was impeaching.” Id. (citing Riddle v. Ozmint, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006)). “Whether the prosecutor's failure to reveal evidence pursuant to *Brady* is due to negligence or an

⁵ This issue is preserved for review since Appellant's pretrial motion was made immediately before the testimony of the three witnesses who *all* testified about what they allegedly observed on the surveillance video with no intervening witnesses. It was also clear from the court's pretrial ruling that it was a final ruling on the issue. See State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001) (“[W]here a [court] makes a ruling on the admission of evidence on the record immediately prior to the introduction of the evidence in question, the aggrieved party does not need to renew the objection [; t]he issue is preserved.”); see also State v. Tufts, 355 S.C. 493, 497, 585 S.E.2d 523, 525 (Ct. App. 2003) (holding an objection to witness testimony was preserved when the trial court ruled on the issue after in camera testimony, the court adjourned, and the next day the state immediately called the witness to which the objection was made); see also State v. Kromah, 401 S.C. 340, 353, 737 S.E.2d 490, 496 (2013) (holding an issue concerning the admissibility of an expert's testimony was preserved where the expert's testimony immediately followed the trial court's *in limine* ruling and there was no intervening testimony between the ruling and the testimony).

intentional act is irrelevant because a court may find a *Brady* violation regardless of the good or bad faith of the prosecutor.” *Id.* at 516, 702 S.E.2d at 402 (citing Gibson v. State, 334 S.C. 515, 528, 514 S.E.2d 320, 327 (1999)).

“While *Brady* imposes a duty on the State to *disclose* material evidence favorable to the defendant, the State has the additional duty, albeit not an absolute duty, to *preserve* evidence that is favorable to the defendant. Although under *Brady* the good or bad faith of the State is irrelevant when the State fails to disclose material, exculpatory evidence, the United States Supreme Court has clarified that a different analysis is required when the State fails to preserve evidence that *might* have exonerated the defendant.” *Id.* at 518, 702 S.E.2d at 403 (emphasis in original); see also Youngblood, 488 U.S. 51.

“While recognizing that the State does not possess an absolute duty to preserve potentially useful evidence, our state supreme court has held that a defendant must demonstrate either that the State destroyed evidence in bad faith, *or* the state destroyed evidence that possesses an exculpatory value that is apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means.” Moses, 390 S.C. at 518, 702 S.E.2d at 404 (citing State v. Mabe, 306 S.C. 355, 358-359, 412 S.E.2d 386, 388 (1991)) (emphasis added).

In this case, Appellant’s due process rights were violated because the state failed to preserve the surveillance footage from Young’s Food Store on the night of the burglary. This footage was the key evidence in the case and was relied on by all three of the state’s witnesses in an effort to establish Appellant’s alleged guilt. Without this evidence, law enforcement would have been unable to prosecute the case as there was no physical or

forensic evidence found at the scene which could have led to the discovery of the burglar's identity.

It is clear the state failed to preserve the footage in bad faith. Vandegrift, the assistant manager at Young's, testified that "we were unsure whether or not the efforts [to burn the footage onto a DVD] would be successful because we had had issues with the laser on that machine that burns it." Tr. 68, l. 23 – 69, l. 4. Consequently, the state was on notice that the system could and had malfunctioned in the past, but did nothing to ensure that the video was properly burned onto the DVD it received from the manager before the system automatically erased the footage after thirty days. If law enforcement, which is a branch of the state, had attempted to verify that the DVD it received from the store manager contained the proper footage when it first received the DVD, it would have discovered there was nothing on the DVD and could have returned to Young's to obtain a proper copy before the end of the thirty day period when the surveillance system automatically erased the footage. There is no evidence law enforcement made any effort to view the DVD when it received it. Instead, the officer simply placed it into evidence at the sheriff's office. This was done in bad faith as the officers knew this was the only real evidence in the case.

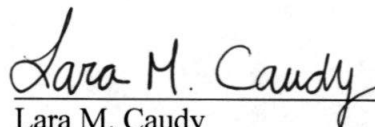
Furthermore, the surveillance footage had exculpatory value in that it would have conclusively identified the burglar and Appellant could have used the DVD to prove his innocence. Without the DVD, Appellant was left with no meaningful challenge to the state's witnesses, especially since the gist of their testimony relied almost entirely upon their observation of the surveillance video. Additionally, Appellant could not have obtained other evidence of comparable value by other means.

Appellant was prejudiced by the state's failure to preserve the DVD of the surveillance footage because it prevented him from preparing a complete defense to the charge. He was unable to challenge the sole evidence relied on by the state and its witnesses. Furthermore, Appellant has consistently maintained his innocence in this case. Before sentencing, he told Judge Young, "I wish y'all would have had the tape. Then you would see for yourself that I wasn't on it." Tr. 150, ll. 11-13.

CONCLUSION

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

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 10th day of July, 2014.

STATE OF SOUTH CAROLINA

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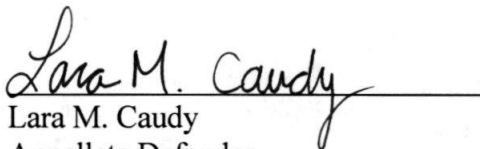
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment;
- (2) Cover page of trial transcript dated January 15, 2014;
- (3) Tr. 23-37; Tr. 48-88; Tr. 90-106; Tr. 113-137; Tr. 139-140;
Tr. 147-152.

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

July 10th, 2014



Lara M. Caudy
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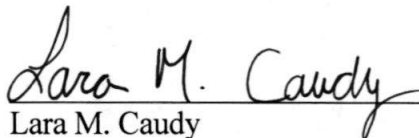
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

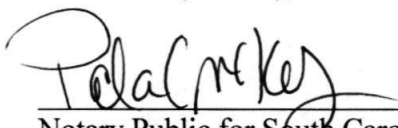
The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 10th day of July, 2014.



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 10th day of July, 2014.

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