

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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JUL 14 2014

Appeal from Dorchester County
The Honorable Doyet A. Early, III, Circuit Court Judge

SC Court of Appeals

Appellate Case No. 2012-213404

STATE OF SOUTH CAROLINA.....RESPONDENT,

v.

DRISTIN JOHNSON.....APPELLANT

FINAL BRIEF OF APPELLANT

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Statement of Issue Presented

Whether the trial judge erred in admitting State's Exhibits 7 and 8, a mask and pair of gloves found at the home of a co-defendant, as evidence where they were not properly linked to the Appellant.

Statement of the Case

Procedural History

Dristin Johnson was charged with one count of burglary in the first degree, two counts of kidnapping and possession of a weapon during the commission of a violent crime. He was tried on November 13-14, 2012 before the Honorable Doyet A. Early and a jury. His co-defendant, Carl Chaplin testified against him in exchange for a five (5) year reduction in his sentence (ROA at 83, 23-25, 246, 1-4). An eleven (11) year old, Kelsey Parker, also testified against him stating that she overheard him planning out the burglary with Carl Chaplin and Christopher Baty, and that the three men left together (ROA at 31, 12-19, 138, 9-21). He was found guilty of all four charges. He was sentenced to twenty-five (25) years for the Burglary, twenty-five (25) years for the two counts of kidnapping and five (5) years for the possession of a weapon during the commission of a violent crime. All charges to run concurrent.

The Notice of Appeal was filed on November 16, 2012.

Factual History

On December 3, 2011, Amber Fish, her boyfriend, Shawn Rabine, and her daughter, Lena Rabine were in her home at 204 Cone Lane in Dorchester County (ROA at 11, 1-9). Someone pounded on the door around 9:00 p.m (ROA at 11, 18-21). Ms. Fish opened the door and a black man with a mask and a black hoodie put a shotgun barrel in her gut (ROA at 12, 9-12). Although, the men had on black masks, Ms. Fish knew was able to recognize the voice of one of the men, Chris Baty, because he has a speech impairment, and would hang out in her neighborhood (ROA at 14, 5). She did not know the other man who had the shotgun (ROA at 14, 15-18). Baty tied everyone up (ROA at 15, 10-11). Baty went through the house looking for items to steal (ROA at 16, 9-11). They took her cell phone, ID, necklace, Xbox, video games, and \$415 (ROA at 17, 14-20). When they left, Ms. Fish untied herself and then untied Mr.

Rabine (ROA at 18, 4-5). They took their daughter and walked next door to call 911 (ROA at 18, 4-6).

ARGUMENTS

- I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ALLOWING STATE'S EXHIBITS 7 AND 8, A MASK AND PAIR OF GLOVES FOUND AT THE HOME OF THE CO-DEFENDANT BATY, TO BE ADMITTED AS EVIDENCE WHERE THEY WERE NOT PROPERLY LINKED TO THE APPELLANT.

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006); State v. Funderburk, 367 S.C. 236, 239, 625 S.E.2d 248, 249-50 (Ct. App. 2006). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006); State v. Funderburk, 367 S.C. 236, 239, 625 S.E.2d 248, 249-50 (Ct. App. 2006). *See also* State v. Wise, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004) ("The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice.").

Andy Martin is a detective for the Dorchester County Sheriff's Office (ROA, pg. 57, 12-15). On December 5, 2011, he went to 110 Pintail, the home of the co-defendant, Baty, in Dorchester County to do a search of the area (ROA, pg. 58, 17-22). Detective Martin found State's Exhibit 7, a black, three-holed, cold-weather mask, and State's Exhibit 8, one pair of blue, cotton gloves (ROA, pg. 61, 15-22). The State moved for the Exhibits to be admitted into evidence (ROA, pg. 62, 1-2).

To preserve an issue regarding the admissibility of evidence, a contemporaneous objection must be made. Failure to object when evidence is offered constitutes a waiver of the

right to have the issue considered on appeal. State v. Wannamaker, 346 S.C. 495, 552 S.E.2d 284 (2001).

Ms. LeMatty, attorney for Appellant, objected to the admission of these exhibits on the grounds of foundation and relevance (ROA, pg. 62, 16-18). This objection was made contemporaneous with the request to the admission of this evidence (ROA, pg. 62, 1-18). The judge ruled that the victim described a mask during her testimony and that the mask was found in the yard of the co-defendant, Baty (ROA pg. 63, 1-2 and pg 181 1-6). As pointed out by Ms. LeMatty at trial, there is no connection between Mr. Johnson and the mask and gloves found at the home of Mr. Baty (ROA pg. 62, 24-25). At this point in time, the only testimony linking Baty and Appellant was from eleven (11) year old, Kelsey Parker who claimed to overhear a conversation between the Defendants who were outside while she was in her bedroom (ROA pg. 31-48). The victim, Amber Fish, knew co-defendant, Baty, but did not know the other individual who committed the burglary (ROA pg. 14, 15-16). There was no evidence submitted at trial that Appellant was at the home of Baty where the exhibits were found. “[T]here must be a connection between the evidence and the crime with which appellant was charged.” State v. McConnell, 290 S.C. 278, 280, 350 S.E.2d 179 (1986). Further the cumulative prejudicial effect of the enumerated evidence must not outweigh its probative value. Id.

There was no evidence presented to show that the mask and gloves were linked to Appellant. More likely than not the mask and gloves located on Baty’s property belonged to him – not Appellant. In the State’s closing arguments, Mr. Justice admits the exhibits were Baty’s. He stated, “I submit to you, that’s because that’s the mask and the gloves that Baty wore.” (ROA pg. 121, 1-5). As such, the admission of State’s exhibits 7 and 8 was highly prejudicial and well

exceeded its probative value. This assertion is supported by the DNA evidence.¹ The DNA on the inside of the ski mask matched the DNA profile of Mr. Baty (ROA pg. 69, 13-17), and Appellant was excluded as a possible minor contributor to the inside of the ski mask (ROA pg. 69, 13-21). Catherine Leisey testified that there was a 1 in 7 probability that Appellant's DNA could not be excluded as a possible contributor to the outside of the ski mask (ROA pg. 69, 6-12). The DNA profile on the gloves was a mixture of at least four individuals and Appellant and Baty had a 1 in 8 probability of contributing (ROA pg. 70, 3-9).

The DNA evidence on State's Exhibits 7 and 8 pertaining to Appellant was extremely prejudicial and very unreliable. There was no DNA linking Appellant to the inside of the ski mask and there was only a chance that his DNA was on the outside of the ski mask or the gloves. Ms. Leisey, expert for the State, agreed that of the thirty (30) people in the courtroom, several of them could have contributed to the mixture on the Exhibits based on these probabilities (ROA pg. 71, 7-15). This DNA evidence was not enough to link the exhibits to Appellant.

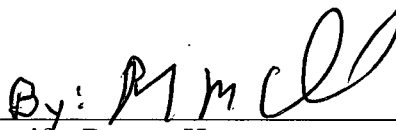
"Error is harmless where it could not reasonably have affected the result of the trial." State v. Gillian, 360 S.C. 433, 455, 602 S.E.2d 62, 74 (Ct. App. 2004). The State's Exhibit 7 and 8 were highly prejudicial without being very probative. The admission of this evidence was not harmless. The evidence was only supported by the testimony of an eleven year old whose memory and credibility should be considered questionable and unreliable. The only other witness to testify as to Appellant's involvement was Carl Chaplin who received a five (5) year reduction in his sentence to testify (ROA pg. at 83, 23-25, 84, 1-4). Without the ski mask and gloves, the credibility of these witnesses would have been questionable enough that the jury would have returned a different verdict.

¹ There was no objection from defense council to the DNA evidence and expert testimony presented by the State. Appellant recognizes that this Court may find that this matter is more appropriate before a PCR motion pursuant to S.C. § 17-27-40.

CONCLUSION

As set forth above, the trial court committed reversible error both in admitting State's Exhibits 7 and 8. Accordingly, Appellant respectfully requests that for the reasons stated herein, the judgment of the trial court be reversed and that he receive a new trial.

Respectfully submitted,

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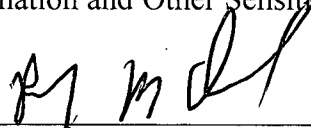
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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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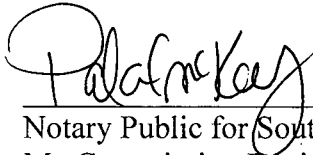
CERTIFICATE OF SERVICE

I certify that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Jennifer Ellis Roberts, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 14th day of July, 2014.



Robert M. Dudek
Chief Appellate Defender

SUBSCRIBED AND SWORN TO before me
this 14th day of July, 2014.



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