STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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

Appellate Case No. 2013-002018

THE STATE,

Respondent,

v.

CHRISTOPHER LEE EMMONS,

Appellant.

INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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The issue of whether the trial court erred in allowing dog tracking evidence is not preserved for appellate review where Appellant failed to follow his pre-trial motion *in limine* with a contemporaneous objection to the evidence. Even if preserved for appellate review, the trial court did not err in allowing the dog track evidence.

II.

The trial court did not abuse its discretion in admitting Harrison's in-court identification of Appellant. While Harrison had seen (1) a still photo from a Wal-Mart surveillance camera on a news broadcast and (2) an online photograph from the jail after he was informed of Appellant's arrest, the identification was not the result of law enforcement action and the accuracy of the identification was properly tested through cross-examination, argument, and jury instructions.

III.

Appellant asked for and received a jury charge on spoliation at trial. He did not request dismissal of the indictments against him, and therefore such issue is not reserved for appellate review. Even if the issue were preserved, Appellant failed to demonstrate either: 1) the State destroyed evidence in bad faith; or 2) the evidence's exculpatory value was readily apparent before the evidence was destroyed, and the defendant cannot obtain other evidence of comparable value by other means. Therefore, a request for dismissal of charges on this basis would correctly be denied.

STATEMENT OF THE CASE

Appellant Christopher Emmons was indicted for attempted armed robbery. (R. p. __, Indictment.) Appellant proceeded to a jury trial before the Honorable Roger L. Couch on September 11-13, 2013. (Tr. p. 1.) Appellant was found guilty and sentenced to ten years imprisonment. (R. p. __, Sentencing Sheet.) This appeal follows.

STATEMENT OF FACTS

On Sunday, August 28, 2011, Jackie Harrison ("Harrison") ate dinner and watched a football game with his parents. (Tr. p. 107.) Harrison left his parents' home, stopped by an ATM, and returned to his home in the Cottage Mill Run subdivision in Boiling Springs. As he pulled into his driveway, another car stopped nearby and Harrison heard someone get out and run up the driveway. Harrison reached for the pistol he kept in his glove compartment. (Tr. p. 31; p. 107; p. 112; p. 120.) It appeared to Harrison that one of the assailants had a shotgun.[1] The man said something along the lines of "give it up." Harrison fired twice, killing the armed assailant standing in his door. (Tr. p. 32; p. 66; p. 108.) Harrison then turned to the second man who approached through the shrubbery between Harrison's house and his neighbor's house. (Tr. p. 57; pp. 72-73.) Harrison fired once at the second man as he spun from his vehicle but missed. Harrison averred that he viewed the man, who he identified in court as Appellant, in the streetlight, staring at his face for only moments with his gun drawn, squaring himself for a second shot if necessary. (Tr. p. 58; p. 82; p. 108; p. 113; p. 115; pp.160-161.) Harrison stated that because he could see this second man was unarmed he decided not to fire again. (Tr. pp. 113-115.) The second assailant then fled on foot toward the neighborhood entrance. Harrison last glimpsed the second assailant near the entrance onto Rainbow Lake Road. (Tr. p. 32.)

Harrison then called 911 from his cell phone. (Tr. p. 118.) As EMT's left their station to respond to Harrison's home, they noticed a white male matching Appellant's general physical description (build and "buzz-cut" short hair) in dark pants with his shirt over his shoulder walking down Rainbow Lake Road toward Wal-Mart. (Tr. pp. 37-40; p.

[1] The assailant had actually been armed with a tire iron. (Tr. p. 108; p. 116.)

168-169; 171.) While the man they saw matched Appellant's general description, EMT's could not say that the man they saw was Appellant. (Tr. p. 171.)

Deputy Brian Fraley ("Fraley") and his K-9, Lando, also responded to the scene at 12:04 am, more than an hour after the incident.[2] Fraley was advised to start his dog near the entrance sign to the subdivision as that was the last place the suspect was seen running which would be uncontaminated by others responding to the area. (Tr. p. 26; p. 186-187.) Fraley's dog, Lando, followed a track leading along the wall of the subdivision, then through the yards of two private homes, and then through a mortuary - a path paralleling Rainbow Lake Road heading from north to south toward Wal-Mart from Cottage Mill Run. After traversing the mortuary property, the trail edged along the grass on Rainbow Lake Road. The trail then turned right into the Wal-Mart parking lot. Fraley and Lando continued on the track to the front door of Wal-Mart at which point Fraley decided to stop because of Lando's training as a bite dog and the presence of civilians in the area. (Tr. p. 27; pp. 188-190; State's Exhibit 7.) While Fraley conceded there was no way to know for sure if Lando tracked the perpetrator, Fraley could say that they tracked a human scent which had been left within the past 2 hours.[3] (Tr. pp. 28-30; p. 187; p. 190; p. 194.)

Officers later obtained surveillance video from Wal-Mart. Based on the video, images of two men, later determined to be Appellant and Landon Bridges, were provided to the media as persons of interest. (Tr. p. 216.) After Appellant's arrest, the sheriff notified Harrison. Harrison then looked up Appellant's photo through the jail web site and felt certain that Appellant was the second assailant. (Tr. p. 58; pp. 146-147.) Later

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[2] While Harrison estimated that he returned home around 11:30 pm, Fraley reported the incident time as 10:43 pm. (Tr. p. 187.) Another officer confirmed the initial dispatch time as 10:43 pm. (Tr. p. 214.)

[3] Lando tracked scents up to 2 hours old, and the spot from which he began his track had been uncontaminated since 10:43 pm. This made it highly likely that the track was that of the perpetrator.

when Harrison picked up his pistol from police, he informed the desk sergeant that he believed the man in the Wal-Mart video he had seen on the news to be the assailant. (Tr. p. 59; p. 148.) Law enforcement never approached Harrison to follow up or to attempt an identification. (Tr. p. 59.)

Landon Bridges ("Bridges"), an acquaintance of Appellant's, went to Wal-Mart that night to purchase fishing gear but realized he had forgotten his wallet. As Bridges returned to his car, he ran into Appellant. Appellant asked for a ride, and Bridges agreed. (Tr. pp. 195-196.) When they got to the car, Bridges and Appellant drove around and "may of smoked a piece of a [marijuana] blunt." (Tr. p. 197; pp. 202-203.) During the drive, Bridges had seen blue lights in the distance but did not consider that to be an extraordinary thing. (Tr. p. 203.) They returned to Wal-Mart for the fishing gear. As they proceeded to Appellant's house, Appellant "said something about trying to hit a lick [rob someone], and he [the victim] shot him [an accomplice]." (Tr. p. 197; pp. 208-210.) Bridges gave Appellant's statement no mind, thinking it was something Appellant said "to look big." (Tr. p. 197.) The next morning, Bridges awoke to find he had missed several phone calls from friends and family telling him that his picture was on the news. (Tr. p. 197.) Bridges went to the Sheriff's Department and left his contact information, but he was not contacted. (Tr. p. 198.)

Bridges was later arrested for narcotics and weapons offenses. (Tr. p. 198.) While in jail, police spoke to Bridges about the events of August 28, 2011. (Tr. p. 198-199; p. 216-217.) Bridges identified himself and Appellant in the stills from Wal-Mart surveillance video, noting Appellant had changed shirts in the car between the visits to Wal-Mart. (Tr. p. 199-202.) Based on Bridges' statement, police sought Appellant.

Appellant lived on Old Furnace Road, southwest of and approximately 1.5 miles from the Wal-Mart.[4] (Tr. pp. 217-218; pp. 234-235.)

Appellant's fiancée, Alexandria Schubert ("Schubert"), recounted that Appellant came home from farm work that evening. According to Schubert, he left their home around 10:15 or 10:30 pm to "meet a guy named O to buy some weed" at Wal-Mart. (Tr. p. 236.) To walk from Appellant's home to Wal-Mart, they'd take Old Furnace Road to Highway 9, never walking on Rainbow Lake Road. (Tr. p. 244.) Schubert stated Appellant and Bridges returned to the home and smoked a joint in the front yard then left again for Wal-Mart. (Tr. p. 238-239.) Appellant had forgotten his shirt when he left, apparently a common occurrence. (Tr. p. 240.) Schubert reported that Bridges dropped Appellant off again about 15 to 20 minutes later. (Tr. p. 241.)

[4] As Appellant lived southwest of Wal-Mart, his path to the store would not cross the route from Harrison's neighborhood north of Wal-Mart.

ARGUMENTS

I.

The issue of whether the trial court erred in allowing dog tracking evidence is not preserved for appellate review where Appellant failed to follow his pre-trial motion *in limine* with a contemporaneous objection to the evidence. Even if preserved for appellate review, the trial court did not err in allowing the dog track evidence.

Following Appellant's motion *in limine*, the trial court found the dog tracking evidence admissible, its weight being a matter for the jury. (Tr. p. 42-44.) However, no objection was made to the Fraley's testimony regarding the dog tracking. (Tr. pp. 185-194.) A ruling *in limine* is not a final ruling on the admissibility of evidence. State v. Griffin, 339 S.C. 74, 528 S.E.2d 668 (2000); State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999). Generally, a motion *in limine* seeks a pre-trial evidentiary ruling to prevent the disclosure of potentially prejudicial matter to the jury. See State v. Floyd, 295 S.C. 518, 369 S.E.2d 842 (1988). A pre-trial ruling on the admissibility of evidence is preliminary, and is subject to change based on developments at trial. Id. Unless an objection is made at the time the evidence is offered and a final ruling made, the issue is not preserved for review. State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993). Because no contemporaneous objection was made when dog track evidence was introduced during trial, the issue is not preserved for review.

Even if the issue is preserved for appellate review, the trial court did not abuse its discretion when it determined that the dog tracking evidence in this case was admissible, noting that whether the scent tracked was that of the Appellant went to the weight of the evidence, not its admissibility. (Tr. pp. 41-43.) The trial judge's decision regarding such a relevancy determination should not be overturned, absent an abuse of discretion. State v. Aleksey, 343 S.C. 20, 35, 538 S.E.2d 248, 256 (2000).

"'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." Rule 401, SCRE. "Evidence which is not relevant is not admissible." Rule 402, SCRE. Any "[e]vidence which assists a jury at arriving at the truth of an issue is relevant. ..." State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986).

The track to the front door of Wal-Mart links the store photos of the entrance to the crime scene, making it more probable that a person seen entering Wal-Mart was the person who escaped from the failed robbery attempt. This evidence was key to establishing the identity of the would-be robber. The dog tracked from the last uncontaminated area where the fleeing would-be assailant was seen. That the dog was trained to track scents left within an hour or at most two hours made it more probable that he was on the track of the surviving assailant.[5] (Tr. p. 29.) Interestingly, the track veered from the main road, Rainbow Lake Road, and went through several private properties before returning to Rainbow Lake Road. Rainbow Lake Road offers a direct route to Wal-Mart. An average pedestrian travelling to Wal-Mart would likely stay with this more direct route rather than winding along the longer and less public route through private yards and mortuary property taken by the individual tracked. This suggests more clearly that the Lando's track may have been that of the second would-be robber. Moreover, it should be noted that while Appellant suggests that Lando's track may have followed Appellant's innocent route of travel from his home to Wal-Mart, the route to Wal-Mart from Appellant's home does not follow Rainbow Lake Road. (Tr. p. 244.)

[5] The time frame given also correlated the track to the robbery attempt. The incident time was given as 10:43 pm. Fraley and Lando arrived on scene at 12:04 am. (Tr. p. 187.) Given that the starting point had been uncontaminated since the incident up to the K-9 team's arrival and the window within which Lando would follow a scent, it seems even more likely that this scent would be linked to the assailant.

While the track could not be conclusively linked to the Appellant, this was a matter for the jury in determining the weight to give the evidence rather than a question of admissibility. State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981)); State v. Asbury, 328 S.C. 187, 493 S.E.2d 349 (1997)(Testimony concerning appliances with severed electrical cords found in defendant's home was relevant where victim's hands and feet were bound with cut electrical cord though items themselves were not related to crimes charged); See also State v. Robinson, 360 S.C. 187, 600 S.E.2d 100 (Ct. App. 2004)(Evidence of flight as a result of charged crime admissible as evidence of guilt).

II.

The trial court did not abuse its discretion in admitting Harrison's in-court identification of Appellant. While Harrison had seen (1) a still photo from a Wal-Mart surveillance camera on a news broadcast and (2) an online photograph from the jail after he was informed of Appellant's arrest, the identification was not the result of law enforcement action and the accuracy of the identification was properly tested through cross-examination, argument, and jury instructions.

"Generally, the decision to admit an eyewitness identification is at the trial judge's discretion and will not be disturbed on appeal absent an abuse of discretion." State v. Liverman, 398 S.C. 130, 137-138, 727 S.E.2d 422, 425 (2012). In the present case, an in-camera hearing was conducted regarding Harrison's in-court identification of Appellant. Harrison saw photos of Appellant twice before trial: (1) a media broadcast of a still photo taken of Appellant and Bridges from Wal-Mart surveillance footage identifying the men as "persons of interest" and (2) an online photo from the jail after Harrison was informed of Appellant's arrest, presumably a booking photo. The trial court found Harrison's identification admissible. Specifically, the trial judge found that there was no "State sponsorship or activity involved in the identification." (Tr. p. 83.) Appellant took no exception to this finding, arguing only regarding reliability of the

identification, "based on the darkness shown in the photographs...I don't think it's possible to do what [Harrison] said he was doing." (Tr. p. 82.) The trial court did not abuse its discretion in admitting the evidence.

Neil v. Biggers, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972) outlined a two-step approach to determine whether a witness' identification should be suppressed. The court must first determine whether law enforcement utilized an identification process which was suggestive. If so, the court must assess whether the out-of-court identification was nevertheless reliable such that no substantial likelihood of misidentification existed. Id. Where no improper law enforcement activity is involved, the United States Supreme Court held that the Due Process Clause does not require pretrial judicial inquiry into reliability, noting:

> ...it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt.

Perry v. New Hampshire, 132 S. Ct. 716, 721, 181 L. Ed. 2d 694 (2012).[6] Our state case law likewise recognizes these principles. State v. Tisdale, 338 S.C. 607, 527 S.E.2d 389 (Ct. App. 2000)(extent to which a suggestion from nongovernment sources has influenced the memory or perception of the witness, or ability of the witness to articulate or relate the identifying characteristics of the accused is a proper issue for the trier of fact to determine). In Tisdale, 338 S.C. 607, three employees present during a bank robbery

[6] In declining to accept Perry's suggested rule which would involve preliminary examinations of all "suggestive" identifications, the Court noted that "most eyewitness identifications involve some element of suggestion." Id. at 727. Among the examples listed are out-of-court identifications where a witness sees a photograph captioned "theft suspect" or hears "a radio report implicating the defendant in the crime." Id. at 728. The "persons of interest" label applied in this case was even less suggestive.

identified Tisdale after seeing either a televised report of Tisdale's arrest or a photo in a newspaper article about his arrest. In affirming the trial court's decision to admit the identifications, the court noted, "...the impetus behind the harsh remedy of exclusion is police deterrence. Although the reliability of an identification may be affected by media identification, no police deterrence would be achieved by excluding evidence where there has been no governmental involvement." Tisdale, 338 S.C. 607.

Harrison stated he was never shown photographs by law enforcement. (Tr. p. 157.) While the still shots were released to the media by law enforcement, the photos were released by a media outlet in terms of "persons of interest," meaning the photos were released as an investigatory tool, not as an attempt to conduct a suggestive identification procedure. In fact, police never sought Harrison to ask whether he could identify anyone in the photos. At the time Harrison saw the still photo, officers were unaware that he could provide a description of the perpetrator, let alone identify him. There were no representatives of law enforcement with Harrison when he saw the newscast. Nothing in the record shows any design by law enforcement in releasing the photo of "persons of interest" to the media to encourage identification of any particular individual. Harrison could have just as easily identified Bridges as the perpetrator from the still pictures. In fact, when Harrison notified law enforcement that he believed one of the men in the still shots was the perpetrator, law enforcement failed to even follow up. (Tr. p. 148-149.) Clearly law enforcement released the photo to news media not as some elaborate show-up identification for Harrison but rather as a request for public assistance in an ongoing investigation.[7]

[7] The use of the media by law enforcement in this manner is certainly to be encouraged. It would be poor policy to deter officers from releasing photographs from criminal incidents where the public may be able to assist in the identification and apprehension of dangerous criminals. It would certainly serve no good end to

Moreover, there was certainly no law enforcement involvement in Harrison's viewing of Appellant's photo on the jail web site. Law enforcement only informed Harrison of Appellant's arrest. Harrison's son then went online, looked up the name of the person arrested, retrieved the photo of Appellant, and showed it to Harrison. (Tr. p. 134; pp. 140-141; pp. 146-147.) Again, no law enforcement personnel were present when Harrison saw the picture, and there is no evidence of a design by police to encourage an identification. The fact that mug shots of all inmates are published by local jails is not the equivalent of police conduct aimed at securing identification. Where an intervening party such as a relative shows a photograph, state action is not involved. See for example State v. Zahner, 545 N.W.2d 337 (Iowa Ct. App. 1996)(Photograph shown to witness by defendant's grandmother as someone who may be using her checks fraudulently did not involve State action and therefore "does not evoke the degree of suggestibility as would have occurred if [witness] had been shown a single photograph by police officers.")

The trial court correctly discerned that this case is not one of improper police conduct. Because the photos were not the result of government action, the concerns regarding Harrison's viewing of the still photo and the booking photo were matters for the jury's determination rather than questions of admissibility, and the reliability of Harrison's identification was tested "through the rights and opportunities generally designed for that purpose." Perry, 132 S. Ct. 716 Appellant had ample opportunity through cross-examination and argument to question the accuracy of Harrison's identification. The jury was also instructed on the requirement that guilt be proved

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put a chill on the practice of releasing photos to the media where a criminal may be dangerous and the public need be warned. Moreover, in the present case, where photos were released as "persons of interest," the risk of suggestion was minimized. Persons of interest may just as likely serve as witnesses or assist in the elimination of possible suspects as turn out to be suspects.

beyond a reasonable doubt, the credibility of witnesses, and the fallibility of eyewitness identification. (Tr. pp. 97-99; pp. 287-288; pp. 292-293; pp. 295-296.)

Even if suggestive law enforcement conduct had been at play in Harrison's identifications, evidence would support a finding that the identification was nonetheless reliable.

> The following factors should be considered in evaluating the totality of the circumstances to determine the likelihood of a misidentification: (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.

State v. Traylor, 360 S.C. 74, 82, 600 S.E.2d 523, 527 (2004). Harrison observed Appellant in the street light, stating his face was illuminated in the light. (Tr.p. 58; p. 76; pp. 113-114; pp. 160-161.) Harrison emphasized that he could see Appellant, noting, "if he had been a little further back or over to the right over this way, he would have been in the shadows and I'd of shot him." (Tr. p. 113.) Harrison stated Appellant "froze" momentarily in the light, and Harrison could see both of Appellant's hands, determining he was unarmed. (Tr. pp. 114-115; p. 154.) While Harrison only viewed the man for a few seconds, his attention was clearly focused as he pointed his gun at the man and feared for his own life. (Tr. p. 115.) Harrison expressed no doubt that Appellant was the man he had seen that night. (Tr. p. 58.) Harrison presumably saw the still photo from Wal-Mart surveillance when his memory was fresh. While no specific date is given, Harrison mentions a friend having seen the the video on the news within days. (Tr. p. 158.) Of the two men in the video, Harrison identified Appellant. Harrison saw the jail photo about 3-4 months after the incident. Harrison's in-court identification of Appellant

occurred over 2 years after the incident and cannot be realistically be deemed to be tainted by that exposure.

III.

Appellant asked for and received a jury charge on spoliation at trial. He did not request dismissal of the indictments against him, and therefore such issue is not reserved for appellate review. Even if the issue were preserved, Appellant failed to demonstrate either: 1) the State destroyed evidence in bad faith; or 2) the evidence's exculpatory value was readily apparent before the evidence was destroyed, and the defendant cannot obtain other evidence of comparable value by other means. Therefore, a request for dismissal of charges on this basis would correctly be denied.

Prior to trial, Appellant requested a jury charge on spoliation of evidence. (Tr. pp. 49-50.) The trial court agreed to consider such a charge at the conclusion of the case. (Tr. p. 53.) At the conclusion of the evidence, the trial court considered the request for a jury charge once more. (Tr. pp. 252-258.) It was not asserted during this discussion that the surveillance tape was lost due to bad faith; the consensus was that the loss of the tape was that the absence of the tape indicated negligence. The trial court ultimately agreed to charge the jury on spoliation of evidence. (Tr. pp. 294-295.)

Here, Appellant never requested any relief other than a jury instruction. Because the trial court granted the Appellant's request for a jury instruction, he cannot complain on appeal. State v. Sinclair, 275 S.C. 608, 610, 274 S.E.2d 411, 412 (1981)(where defendant received relief requested from the trial court there is no issue for the appellate court to decide). Appellant was granted the jury instruction he requested. Appellant never requested that the indictments be dismissed. Therefore, the issue is not preserved for appellate review.

Even if Appellant had requested dismissal of the indictments, the argument would be without merit. The State does not have an absolute duty to preserve potentially useful

evidence, and a defendant must demonstrate either: 1) the State destroyed evidence in bad faith; or 2) the evidence's exculpatory value was readily apparent before the evidence was destroyed, and the defendant cannot obtain other evidence of comparable value by other means. State v. Moses, 390 S.C. 502, 702 S.E.2d 395, 404 (Ct. App. 2010) (*citing* State v. Mabe, 306 S.C. 355, 412 S.E.2d 386 (1991)). The bad faith requirement limits the extent of the State's obligation to preserve evidence to reasonable bounds, and confines it to cases in which the police conduct indicates the evidence could form a basis for exonerating the defendant. Arizona v. Youngblood, 488 U.S. 51, 58, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988); Moses, 702 S.E.2d at 403.

In this case, the surveillance tape of the Wal-Mart entrance was, at best, potentially useful evidence, and the State had no absolute duty to preserve it. Therefore, Appellant must show either bad faith by police or that the surveillance tape had readily apparent exculpatory value. Appellant cannot meet either prong of the spoliation analysis.

Appellant does not contend that Wal-Mart's surveillance video was intentionally destroyed to avoid revelation of exculpatory evidence. Counsel stated regarding the video, "I don't know that it was intentional, but it is negligent." (Tr. p. 253.) The solicitor concurred, stating he had no information or evidence indicating bad faith but the "mere fact that it's missing I think indicates a certain minimal level of negligence." (Tr. p. 254.) When Loren Williams ("Williams") of the Spartanburg Sheriff's Office was asked what happened to the video, he replied he did not know. Williams acknowledged that the loss of the video was a mistake, stating that he had recorded who did the work to print stills from the video, but he had no record of who put the tape in evidence. (Tr. pp. 227-228.) As in Youngblood, 488 U.S. 51, police conduct which can at worst be described as

negligent does not rise to the level of bad faith. Thus, Appellant clearly cannot meet the first prong of the spoliation analysis.

Nor can Appellant show Wal-Mart's door surveillance video had any exculpatory value, much less "readily apparent" exculpatory value. It is unclear when Wal-Mart's video was lost, but it appears to have been misplaced shortly after the stills of Appellant were made. (Tr. p. 228.) Therefore, at the time there was certainly no evident exculpatory value; it was not even known then that the tape would have inculpatory value until Bridges came forward sometime later.

Appellant suggested through cross-examination that the surveillance video would have shown how many other white males entered Wal-Mart that evening. Appellant further speculates that the original video may have been time stamped (as opposed to the handwritten notations of time on the still pictures, none of which have been shown to be inaccurate) which may have given him an alibi if the time stamp showed he was in Wal-Mart at the time of the botched robbery attempt.

While Appellant argues that the surveillance video could have shown other white males entering Wal-Mart during the same time frame, this notion was argued to the jury, and the jury was charged that they could infer exculpatory evidence existed on the lost tape. The jury could therefore consider this argument based on common sense. The videotape could just as easily have shown no other or very few males of the same build entering the store in the same time frame; this seems the more likely assumption since police narrowed their search to information on these two men when all they had to go on was that the assailant was a white male. In Moses, 702 S.E.2d 395, this court upheld the trial court's finding that the mere assertion that a videotape may have led to additional witnesses who in turn may have led to the defense to favorable evidence or impeachment

evidence was insufficient. Similarly, the speculation that the videotape would have shown others entering Wal-Mart around the same time or that the videotape may have had time stamping contrary to the handwritten notes on the stills should be found insufficient. The jury, free to make such an inference, clearly found that the evidence established guilt beyond a reasonable doubt.

Further, Appellant does not contest that he was present at Wal-Mart sometime after the botched robbery attempt; he only maintains that he was there by happenstance. Appellant's fiancée Alexandria Schubert stated that Appellant left their home on foot to purchase marijuana around 10:15 or 10:30 that night. (Tr. p. 236.) She estimated that the mile and a half walk took 45 minutes to an hour when pushing a stroller. (Tr. p. 237.) According to Schubert, Appellant returned to the home around 45 minutes after he left in a car with Bridges. (Tr. p. 238.) He and Bridges smoked a joint then left again for Wal-Mart. (Tr. p. 239.) She estimated that Bridges dropped Appellant off again about 15 to 20 minutes later. (Tr. p. 241.)

In the absence of **any** evidence the State acted in bad faith, or the videotape had exculpatory value, the State was not required to preserve the videotape, and failure to do so did not violate Appellant's due process rights. Appellant contends he was entitled to a dismissal of the charges against him simply because the videotape was no longer available. To do so under the circumstances of this case would effectively eviscerate the limits established in Youngblood, and adopted by the courts of South Carolina, by requiring the State to preserve any evidence the defense might claim was "potentially" useful, even if there is no indication the evidence had exculpatory value. Such a result imposes an unwarranted burden on the State, which would allow dismissal of the entire case based on nothing more than a defendant's conclusory claim particular evidence

might have helped the defense. Further, Appellant received the requested relief in this case, a charge to the jury regarding spoliation of evidence. As he received the relief requested, his argument regarding dismissal of charges is not preserved for appellate review. For all these reasons, this argument is without merit.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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Sept. 12, 2014

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STATE OF SOUTH CAROLINA

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

Appellate Case No. 2013-002018

THE STATE,

Respondent,

v.

CHRISTOPHER LEE EMMONS,

Appellant.

PROOF OF SERVICE

I, Ellen DuBois, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Carmen V. Ganjehsani, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 12th day of September 2014.

Ellen R. DuBois

ELLEN DUBOIS
Legal Assistant

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ALAN WILSON
ATTORNEY GENERAL

September 12, 2014

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RE: State v. Christopher Lee Emmons
Appellate Case No. 2013-002018

Dear Ms. Ganjehsani:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Mary S. Williams
Assistant Attorney General
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MSW/erd
Enclosures

cc: Honorable Jenny A. Kitchings (original and one enclosed)
Victim Services