

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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MAY 06 2015

Appeal from Charleston County
Deadra L. Jefferson, Circuit Court Judge

SC Court of Appeals

THE STATE,

RESPONDENT,

v.

BENJAMIN LAVON SMALLS,

APPELLANT,

APPELLATE CASE NO. 2014-001539

PRO SE BRIEF OF APPELLANT

TABLE OF AUTHORITIES

CASES

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in admitting State's Exhibit '15' which is a cardboard box with a actual firearm that was found hours later where Appellant Smalls was arrested which are prejudicial because nothing connected Appellant Smalls to the Firearm or confirmed that it was the Firearm use in the crime which Appellant Smalls was find guilty of?

STATEMENT OF THE CASE

On September 12, 2011, the Charleston County Grand Jury indicted Benjamin Lavon Smalls on the charges of Arm Robbery (AR) and possession of a firearm during the commission of a violent crime. On the July 7, 2014, Smalls proceeded to trial before the Honorable Deadra L. Jefferson and a jury. Smalls was represented by Robert L. Filliard, and the state was represented by David Osborne and Greg Voigt. The jury returned verdicts of guilty on both charges as indicted. Judge Jefferson sentenced Smalls to five years on the gun charge and twelve years on the Arm Robbery charge. The sentences were to run concurrent with each other. Smalls Attorney filed a notice of appeal.

ARGUMENT

The trial court erred in admitting State's Exhibit '15' which is a cardboard box with the actual firearm that was found hours later where Appellant Smalls was arrested which are prejudicial because nothing connected Appellant Smalls to firearm or confirmed that it was a match or even similar to the firearm use in the crime.

Ronzell Olds, who was an eighteen year old young man, lived with his mother, two sisters, and niece in Charleston. On May 25, 2011, when his mother left for work, she gave him the rent money of \$600 to pay the landlord when he came that day to collect. Ronzell was also to watch his younger sister. When his older sister came, Ronzell left to meet his friend, Brandon Nelson. He took \$600 rent money with him because the landlord did not come.

Ronzell and Brandon went to the home of another friend, Montez Dozier, where they played cards and video games. They were gambling with Ronzell's thirty dollars and not the \$600 dollars rent money.

When they finish playing games Ronzell and Brandon got ready to leave and started walking around the house to leave and Ronzell said on the way leaving Smalls and David Capers confronted him. Smalls and Capers then grab Ronzell's arm, and both Smalls and Capers pulled guns and stuck them to Ronzell's head. Ronzell gave them '200' dollars at first but then gave them all of the rent money. Smalls and Capers jumped into Ashley's car, as she was parked in front yard preparing to leave, and left.

Olds talked to the police that night but only because his mother threaten him saying if you don't tell the police somebody name ~~£~~ you cannot stay in my house. At first he told the police he did not know the men that robbed him. After his mother told him he had tell the police something or less he couldn't stay in her house, Ronzell decided to come up with a story to tell the police, and told them he knew the robbers as they did not wear masks. He knew Appellant Smalls and Capers from the neighborhood, and told the police they were the men who robbed him. He confirmed this hours later through a photo-lineup. He said he could not give a description about the gun because he did not get a good look at it.

Appellant Smalls was arrested May 31, 2011 in Applebee way in West Ashley. Later that evening after the arrest, the gun was recovered from Applebee way. Smalls doesn't live here, he just got arrested there. In an effort to link Smalls to the gun, Sergeant. George Bradley of the Charleston Police Department obtained a search warrant to collect a buccal swab of DNA from Smalls at the detention center. He collected the DNA sample from Smalls as soon as he obtained the warrant. In the search warrant it simply states that the saliva sample obtained compared to the pistol will assist in fairly and accurately determining the guilt or innocence of Smalls which is in the community's highest interest.

Sergeant. Bradley also listen to the jail tapes of the phone calls Smalls made from the jail which the police had obtained. Sergeant Bradley admitted there was ~~no~~ no mention of a gun in the phone calls. Smalls had made a call and talked about getting an item out of the house but did not talked about a gun.

DNA was taken from the gun recovered. The analysis showed it was a mixture of at least two people. However, the DNA sample from the gun did not have enough DNA to make a conclusive statement in comparing it to anyone. The scientist could not link Smalls to the DNA on the gun.

The gun was tested for fingerprints but no fingerprints were recovered from the gun.

In the closing argument to the jury, the solicitor argued that although there was no mention of matching DNA on the gun and no fingerprints, the basket with the gun was at the top of the stairs. He argued that in his first call from the jail, Smalls told the person to get the item from the basket.

The admission or exclusion of evidence is left to the sound discretion of the trial judge. State v. Black, 400 S.C. 10, 16, 732 S.E. 2d 880, 884 (2012).

The Court of Appeals held in State v. Gore, 408 S.C. 237, 758 S.E. 2d 717 (Ct. App. 2014), citing State v. Rosemond, 335 S.C. 593, 518 S.E. 2d 588 (1999), that the relevance, materiality and admissibility of photographs are matters within the sound discretion of the circuit court and a ruling will be disturbed only upon a showing of an abuse of discretion.

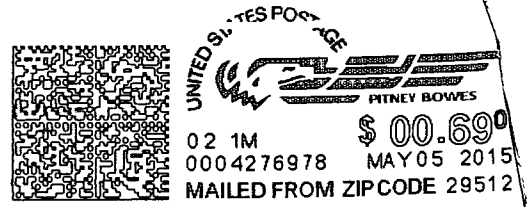
Even if the evidence was improperly admitted, the admission must be prejudicial to warrant reversal.

The trial court erred in admitting the cardboard box with the firearm inside it because it was prejudicial to Smalls. The gun had no fingerprints nor DNA that matched Smalls. The victim said in trial that he could not describe the guns that was use in the crime because it was too dark. The gun was recovered hours after Smalls was arrested and removed from the house. This gun being used in trial is a Manifest Constitutional Error regardless how it's being argued. Nothing is connecting Smalls to the gun or even identifying that it was the gun used in any crime.

Conclusion

Based on the above, the convictions and sentences should be reversed, and the case remanded for a new trial.

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