THE STATE OF SOUTH CAROLINA

In The Court of Appeals

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SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS

The Honorable Alison Renee Lee

Appellate Case No. 2014-002105

Michael Edward Schulz,

Appellant,

v.

City of Greer,

Respondent.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I.

The trial court improperly prohibited cross-examination by Appellant and admission into evidence of material published by the National Highway Safety Transportation Administration regarding the affect of texting on driving. Appellant was prejudiced as the information added significant insight to the affect of texting on driving, and its similarity to what was alleged to be impaired driving by the Appellant due to consumption of alcohol.

II.

The trial court improperly allowed the jury to view visual aids during deliberations, which were not admitted into evidence. A contemporaneous objection was not made by Appellant as he was not made aware that the jury had made such a request, and did not learn that the jury had been allowed to view the visual aids until after the proceedings had concluded.

STATEMENT OF THE CASE

Appellant was tried in Greer Municipal Court on September 27, 2013, for a charge of Driving Under the Influence. After deliberations, the jury found Appellant guilty. Counsel for Appellant timely appealed the guilty verdict, arguing several rulings were made in error by the trial court, noticing his appeal on September 30, 2013.

The Honorable Alison Renee Lee heard the appeal from Municipal Court on May 20, 2014. On August 20, 2014, the Circuit Court issued its Order affirming the Appellant's conviction in lower court. (Circuit Court Order p.7). The Circuit Court did find that the trial court abused its discretion in prohibiting the admission of certain evidence by the Appellant, although it determined that the error was not prejudicial to the Appellant, as it did not provide any substantive additional information for the jury to consider. (Circuit Court Order p. 5) Further, the Circuit Court found that the jury being allowed to view material during deliberations that was not admitted into evidence was not preserved for review. (Circuit Court Order p. 6). Appellant timely noticed this appeal of the Circuit Court's rulings on these issues.

ARGUMENT

1.

The trial court improperly prohibited Appellant from questioning the arresting officer concerning, or allowing into evidence, a study authored by the National Highway Transportation Safety Administration (NHTSA), a Federal Agency, pertaining to the dangerous nature of texting while driving, a critical component in Appellant's case.

At the time this case was tried, there was no statewide restriction on texting while driving, although a number of municipalities had prohibited such distracted driving. Appellant's counsel felt that the dangers of using mobile devices while driving, and more importantly, the effect of such use on actual driving, were not well known to the public. A recently published government study by the National Highway Traffic Safety Administration (NHTSA) had very clearly and descriptively illustrated the dangers of sending or reading electronic messages while driving, and the affect on driving errors that it caused.

During direct examination by the city prosecutor, the arresting officer contended that poor driving due to texting was different than impaired driving (Tr. p.29, ln 6) and later claimed during cross-examination that texting or distracted driving was not a possible cause of poor driving like that exhibited by Appellant (Tr. p.51, ln. 24, p.53, ln.13). When attempting to question the arresting officer concerning the recent NHTSA study and its findings concerning the significant affects of texting or emailing on driving, and the similarity of these affects with impaired driving, counsel for Appellant was not allowed to proceed. The trial court would not allow Appellant to question the officer regarding specific findings of the study or publish those findings to the jury. The trial court seemed to anchor its decision on whether the arresting officer was familiar with the

proffered NHTSA study, the court's refusal to recognize NHTSA was a public authority, and that a foundation must be laid before questioning of the officer concerning the NHTSA study. (Tr. p. 105-118) Appellant argued that the study was properly admissible under the "public records and reports" exception to hearsay evidence that was found in Rule 803(8), SCRE. (Tr. p. 105, 109), and was self self-authenticating under the "official publications" provisions of Rule 902(5), SCRE. Those rules provide as follows:

> Rule 803(8), SCRE–Hearsay Exceptions; Availability of Declarant Immaterial
> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
> (8) Public Records and Reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however in criminal cases matters observed by police officers and other law enforcement personnel; provided, however, that investigative notes involving opinions, judgments, or conclusions are not admissible. Accident reports required by S.C. Code Ann. §§ 56-5-1260 to -1280 (1991) are not admissible as evidence of negligence or due care in an action at law for damages.
>
> Rule 902(5), SCRE – Self-Authentication
> Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:
> (5) Official Publications. Books, pamphlets or other publications purporting to be issued by public authority.

Appellant further argued that the texting and driving study was produced by the very same government agency that provided the officer's training on DUI detection, with which the officer stated he was familiar and considered an authority on highway safety. (Tr. p.115-116; p.47-48; p.106) Appellant contended that NHTSA is a public agency under the United States Department of Transportation and proffered testimony that the

report indicated in its content that it was a publication of NHTSA and the Department of Transportation. (Tr. p. 119)

Appellant argued that the arresting officer's claim of unfamiliarity with the study should not have prohibited its introduction, particularly when it concerns highway safety issues with which he should be expected to be familiar, and even more particularly when the study is by the same government agency that provides his DUI detection training (NHTSA). Appellant sought to show the arresting officer's evasiveness concerning the NHTSA study was grounded in his interest in the outcome of the trial. Although this arresting officer was a sergeant in the Greer Police Department and 18 year veteran of law enforcement, he denied receiving any training concerning the dangers of texting and driving, (Tr. p. 126 ln. 9-12) or having knowledge of any municipalities throughout our state that had prohibited this conduct at that time. (Tr. p. 56) Further, the arresting officer had earlier admitted that NHTSA was authoritative concerning highway safety (Tr. p.106 ln. 4-7) and that his own DUI detection training had been provided by NHTSA guidelines and its studies of impaired driving. (Tr. p. 47-48) If cross examination of a witness is limited only to information of which the witness admits knowledge, that would only encourage purposeful evasiveness or simple claims of ignorance to end an inquiry of counsel.

Upon review on appeal, the circuit court agreed with Appellant that the municipal court abused its discretion in prohibiting the admission of the report. (Circuit Court Order p.5) The court noted that the South Carolina Supreme Court has acknowledged that NHTSA is a federal authority. Preister v. Cromer, 401 S.C 38, 49, 736 S.E.2d 249, 255 (2012); Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 47, 691 S.E.2d 135, 148

(2010). Additionally, the circuit court noted that the Fourth Circuit Court of Appeals has explicitly held that a NHTSA report "fits snuggly within the [public records] exception." Jones v. Ford Motor Co., 204 F. App'x 280, 284 (4th Cir. 2006)

However, the circuit court further concluded that the error was harmless. The circuit court found that the information proffered from the study was brief and did not provide any substantive additional information for the jury to consider. (Id at p. 5)

Appellant would respectfully submit that the material contained in the NHTSA study was indeed substantive information for the jury to consider and that the prejudice to Appellant in excluding this evidence was significant, as the strength of the city's case was the poor driving of the Appellant. Appellant's primary defense was that his poor driving was due to an emotionally charged series of texts and mobile calls with this fiancé after just leaving a heated argument with her. The significance of the Appellant's poor driving was further highlighted by it being the only point illustrated by the city prosecutor on his visual aids used in his direct and closing arguments, and with the jury's request to view those visual aids again just after beginning deliberations.

Further significance of the omitted NHTSA study was apparent when the arresting officer downplayed the dangers of texting and driving and only admitted that it "can be" dangerous. (Tr. p. 104). The arresting officer repeatedly made distinctions between errors drivers made when texting as opposed to when they are impaired by alcohol or drugs, (Tr. p. 29, p.51, ln. 24 - p.56, ln.6) although, the arresting officer testified that he had received no training regarding the dangers of texting while driving. (Tr. p. 126 ln. 9-12). The findings of the NHTSA study could have been used to directly challenge the driving distinctions asserted by the arresting officer.

Appellant's interest in publishing the findings of the NHTSA texting study to the jury included impeaching the officer by showing authoritative evidence of just how much of an affect texting has on driving errors, and countering his suggestion that Appellant's poor driving could only have been due to impairment from alcohol. Appellant believed that the findings of the recent NHTSA distracted driving study would educate the jury, with data and conclusions from the very same government agency (NHTSA) that established the standardized DUI field sobriety testing the arresting officer relied on to support his arrest. These data and conclusions would have illustrated to the jury just how similar the affects of distracted driving are to those driving errors of the Appellant noted by the officer and attributed to impaired driving.

The NHTSA study included authoritative information that was vital to the jury understanding just what affect texting and distracted driving could have on one's driving, particularly in light of the city's contention that somehow texting caused different driving errors than impaired driving. (NHTSA study pp. 5-7) The findings of the study that were proffered included that:

> *... "Sending or receiving a text takes a driver's eyes from the road for an average of 4.6 seconds, the equivalent at 55 miles per hour of driving the length of an entire football field, blind'...*
>
> *..."Studies show that texting simultaneously involves manual, physical and mental distraction and is among the worst of all driver distractions., and*
>
> *..."Observational surveys show that more than 1000,000 drivers are texting at any given daylight moment, and more than 600,000 drivers are holding phones to their ears while driving"...*

Further, the Circuit Court failed to note additional information from the proffer that would also have potentially significant effect on the jury and its conclusions

regarding the Appellant's driving. There were two graphs of data *concerning drivers' crash or near-crash involvement due to texting or distracted driving* (Tr. p. 120 ln.15-19)

Error is harmless only when it could not reasonably have affected the result of the trial. State v. Wiley, 387 S.C. 490, 497, 692 S.E.2d 560, 564 (Ct.App. 2010). In this case, the material contained in the NHTSA Distracted Driving study could have affected the outcome of the trial in a number of ways.

Among the benefits to Appellant in utilizing the NHTSA study to impeach the officer was to challenge the officer's testimony that driving errors due to texting were somehow different than driving impaired by consuming alcohol. Appellant's purpose was not simply to show a general concern with texting and driving, as the Circuit Court seems to conclude. The officer pointed to a specific jerking or swerving that in his experience was indicative of those texting while driving. (Tr. p. 29) The government-authorized findings directly contradicted the arresting officer's assertions that texting and driving caused only a certain driving error, and instead, revealed the likelihood of many driving errors occurring, as one drove as if blind at normal highway speeds.

Another benefit in questioning the arresting officer with the NHTSA distracted driving study was to directly challenge the arresting officer's contention that Appellant's own poor driving, as observed on the field video, was not due to texting. The NHTSA study highlighted the dangers of texting and illustrated very clearly how its affect on driving could be very similar, if not worse than impaired driving. Appellant was not allowed to educate the jury on this point and expose the officer's refusal to acknowledge another possible cause for Appellant's driving errors.

A further potentially significant impact of the information contained in the NHTSA study is that it would have likely countered the officer's downplaying of the seriousness of texting and driving and would have further underscored apparent deficiencies in his DUI detection training. Appellant was attempting to show that the arresting officer should be aware of the specific dangers of texting while driving, and what affect such distracted driving had on driving performance. Appellant's counsel had used DUI Detection training manuals promulgated by NHTSA earlier in his cross-examination to show the officer's errors in proper administration of field sobriety tests and to highlight the officer's poor training or recollection of training he received. (Tr. p.80-82) Illustrating to the jury a study from the very same NHTSA agency that had provided this officer's DUI training, was significant. It was particularly strong when that study provided informative findings regarding texting that could be considered contrary to the officer's conclusions about the cause of Appellant's driving. Appellant was left unable to challenge the officer's downplay of the dangers of texting as opposed to drinking and driving.

Although the officer acknowledged that he recognized NHTSA as an authority on traffic safety (Tr. p. 106), and that his DUI detection training was based on Standardized Field Sobriety testing provided by NHTSA manuals and based on numerous studies compiled by NHTSA, he was hesitant in acknowledging the authority of a NHTSA concerning their studies on the impact texting or distracted driving on driving errors (Tr. p. 105-108). The officer's evasiveness regarding his knowledge of the dangers of texting while driving could have been used significantly more in Appellant's favor had he been allowed to compare the officer's testimony with the NHTSA study. (Tr. p. 125-126)

This contradiction, had it been allowed to be developed, would have likely weighed considerably on the issue of the officer's credibility and his interest in the outcome of this case.

All of these points would have likely caused the jury to question more closely the arresting officer's assertions that the Appellant was driving while impaired by alcohol, instead of his poor driving being due to texting during a heated argument as Appellant explained. The findings of the NHTSA study would have likely bolstered Appellant's description of the cause of his driving errors.

Harmless error was also addressed in State v. Outlaw, 307 S.C. 177, 180, 414 S.E.2d 147, 148 (1992), where it involved the issue of credibility of witnesses. The Court in Outlaw held that error which substantially damages the credibility of a defendant cannot be held harmless where such credibility is essential to his defense. Here, authoritative evidence that could have supported Appellant's explanation of the cause of his driving errors was barred by the trial court. Further, although Outlaw involved the credibility of the defendant, evidence that would bring into question the assertions or conclusions of an arresting officer would likewise bring into question that officer's credibility, training, knowledge, or bias towards winning a conviction on his arrest.

The arresting officer had maintained that texting and driving did not cause the same degree of impaired driving as observed by the Appellant. (Tr. p.29) He claimed not to be familiar with texting becoming banned by a growing number of municipalities at that time. (Tr. p.56) The officer claimed to have received no training or awareness information about the dangers of texting and distracted driving. (Tr. p. 126) The arresting officer added that none of the fatal accidents he worked involved texting and driving. (Tr.

p. 125, ln.24 – p.126, ln. 2) The arresting officer's credibility would likely been called into question when faced with a NHTSA study, from the very same government agency that had promulgated his DUI training guidelines, and that had keenly and clearly articulated the level of danger caused by texting and distracted driving. Comparing texting while driving as the …'equivalent of driving blind at 55 mph for the entire length of a football field'… would have gone a long way toward impeaching the arresting officer's earlier testimony regarding texting and distracted driving. The NHTSA study would have supported Appellant's primary defense in this case, that his poor driving was being mistaken for impaired driving when it was due to texting or distracted driving.

The Appellant's attempts to cross-examine the arresting officer with the specific data and conclusions of the NHTSA study were designed to directly counter the claims of the city and arresting officer concerning texting and driving, and their assertions that Appellant's driving could only be due to impairment from alcohol. The vivid illustrations contained in the NHTSA study would have likely challenged, very effectively, the credibility of the officer's testimony in downplaying any role of texting in Appellant's poor driving, which was supported only by his reference to his training and experience.

II.

The Trial Court improperly allowed the jury to view visual aids during deliberations, which were not admitted into evidence. A contemporaneous objection was not made by Appellant as he was not made aware that the jury had made such a request, and did not learn that the jury had been allowed to view the visual aids until after the proceedings had concluded.

The jury in this case was allowed to consider during their deliberations material that was not in evidence. When the jury retired to begin its deliberations, counsel for Appellant joined the court's clerk outside at the rear of the courthouse, along with Appellant, while the jury considered the case. Shortly after beginning deliberations, the jury apparently asked if they could again view the visual aids concerning the Appellant's poor driving. These visual aids were created during the prosecutor's examination of the arresting officer and used as an illustration during the city's closing argument.

The Court apparently inquired of Appellant's Counsel's assistant, a new associate who had not participated in the trial and who merely sat by counsel to observe and assist in retrieving documents. Without advising Appellant's counsel, the trial court apparently obtained consent from Counsel's assistant for the jury to view the visual aids. The Court did not address this with Appellant's actual trial counsel or even notify the Appellant or Appellant's counsel that there was an initial question.

The record does not include any explanation as to why neither Appellant nor Appellant's counsel were not summoned back to the courtroom to consider this initial question of the jury. It is unclear in the trial transcript, however the municipal court's return references an inquiry to 'co-counsel' for the Appellant concerning the viewing of the visual aids. (Municipal Court's Return p. 5) The trial transcript does include the

Court noting that the visual aid was not actually in evidence and a concern with any discussions taking place while the jury was back in the courtroom. (Tr. p. 191)

When the jury had its second question concerning viewing portions of the video after the traffic stop, Counsel for Appellant was informed and brought back into the courtroom to formally address that question. (Tr. p. 191-192) Although the transcript includes the trial court referring briefly to an earlier question, Appellant's counsel did not catch that brief reference and was unaware that the first question had even been addressed until after the proceedings had concluded.

Upon review on appeal from the municipal court, the Circuit Court concluded that there was no evidence in the record of either Appellant's attorney or co-counsel objecting to the viewing of the visual aids. (Circuit Court Order p.6) Appellant would submit that it is problematic that there is also no evidence in the record that counsel for Appellant was even made aware that the jury had such a question, or the specific dialogue that apparently took place between the municipal court and Appellant's counsel's assistant who remained in the courtroom as deliberations began.

Appellant takes issue with the propriety of the trial court addressing such a question to a non-participating associate, without seeking to give notice of the question to Appellant's trial counsel who had been litigating the entire matter, or the Appellant who remained outside the courtroom with counsel and unaware that the question had even been raised.

In State v. Hill, 394 S.C. 312, 714 S.E.2d 879 (Ct.App. 2011), this Court considered the jury's receipt of statements during deliberations that were not admitted into evidence, and where a contemporaneous objection was not made due to the error

being discovered after the proceedings had concluded. Likewise, in the present case, Appellant's counsel failed to learn what had occurred regarding the visual aids until after the conclusion of the proceedings.

It is fundamental that only evidence that is properly admitted can be placed in the hands of the jury for consideration. The oath that is taken by every juror is required to ensure their decisions are based only on the evidence, and nothing else. The jury is cautioned that the arguments of counsel are not evidence. And here, in response to a question from the jury during deliberations, the municipal court allowed the jury to leave their deliberation room and return to the court room to view the city prosecutor's argument illustrations in the form of visual aids on an easel, illustrating the city's contentions regarding the defendant's poor driving.

Clearly, this error should not be considered harmless, as the jury thought it important enough to actually ask to view the material while deliberating their decisions. Error is harmless when it could not reasonably have affected the result of the trial. State v. Wiley, 387 S.C. 490, 497, 692 S.E.2d 560, 564 (Ct.App. 2010). Appellant submits that an issue that sparks a request to review again certain material was clearly important in the minds of the jurors when reaching their verdict. Jury thought it was important. They specifically asked to see it. And it likely made a difference in their decision.

Here, as in Hill, we are precluded from being able to unequivocally ascertain whether the jury's verdict rested on the evidence presented at trial or whether the verdict was improperly affected by again viewing material not in evidence. The poor driving of the defendant was a primary issue in the case and clearly weighing in the jury's minds. Allowing the jury to return to the courtroom during deliberations and again study the

visual aids created by the prosecutor to support his case is the equivalent of allowing the City to make an additional closing argument without the same opportunity for the Appellant.

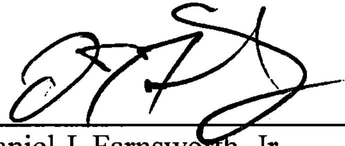
As to the lack of a contemporaneous objection, in this instance, Counsel was not given a fair opportunity to address the question, or made aware that the question had even been submitted. Further, it was improper for the court to defer such a question to counsel's assistant, who was not participating as counsel in the trial.

Appellant respectfully submits that it was error to allow the jury to view this material, and error not to inform Appellant's trial counsel of the question and give him an opportunity to object to the same.

CONCLUSION

Appellant would respectfully request that a new trial be granted, with instructions to the trial court that Appellant be allowed to cross-examine the arresting officer with the proffered material and the same be admitted into evidence upon motion of the Appellant.

Respectfully submitted,



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STATE OF SOUTH CAROLINA
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PROOF OF SERVICE

I, Brad Tollison, certify that I have served the within Initial Brief of Appellant and Designation of Matter to be Included in the Record on Appeal on the Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served. This 29th day of May, 2015.

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