

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
G. Thomas Cooper, Circuit Court Judge

RECEIVED
DEC 17 2015
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

WENDELL BERNARD WILKINS,

APPELLANT

APPELLATE CASE NO. 2014-002276

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in admitting the second security video (State's Exhibit 14)¹ from the Fast Fuel No. 8 convenience store which was a spliced version of the raw footage which the state prepared following a first mistrial when only the raw video tape was admitted; and the state's action was prejudicial to Appellant Wilkins because the state changed the evidence?
2. Did the trial court err in admitting the original raw footage security video (State's Exhibit 16) from the Fast Fuel No. 8 convenience store because Camera 15 of the 16 cameras was missing, and the video was confusing as it showed the attempted robber in different places at the same time on different cameras?

¹ The following Exhibits are on file with this Court: State's Exhibits 1-13(photographs); State's Exhibit 14 (spliced video CD); and State's Exhibit 16 (raw footage video CD).

STATEMENT OF THE CASE

On August 4, 2013, the Spartanburg County Grand Jury indicted Wendell Wilkins on the charge of attempted armed robbery. On October 13-14, 2014, Wilkins proceeded to trial before the Honorable G. Thomas Cooper and a jury.² Wilkins was represented by Robert B. Hall, and the state was represented by Samuel R. Bass, II, and Danny N. Fulmer. R. 1. The jury returned a verdict of guilty as indicted. Judge Cooper sentenced Wilkins to twelve years active service. R. 174, ll. 19 – 24. Wilkins' attorney filed a notice of appeal. This appeal follows.

² The first trial was held April 15, 2014 before the Honorable Doyet Early but ended in a mistrial. R. 33, ll. 7 – 14; R. 171, ll. 19 – R. 172, ll. 6.

STATEMENT OF FACTS

On April 4, 2013, there was an attempted armed robbery at the convenience store, Fast Fuel No. 8 on Cannons Campground Road. R. 42, ll. 6 – 16. Salvador Arias Bonifacio was working as the store clerk that day. About five o'clock on this rainy afternoon, a man wearing a hoodie and mask came in with a gun. He asked for money. When he did not get it, he fired a shot into the cigarette case. However, Salvador believed the man was not shooting at him and just wanted to scare him. Salvador resisted and the two men fought. Salvador pulled off the man's hoodie and mask. The bullet clip came out of the gun and the man hit Salvador in the head with the gun. R. 45, ll. 7 – R. 48, ll. 6.

The man ran out of the store and Salvador followed him. He saw the man get into a car and turn into a neighborhood which was a U circle. When Salvador ran to the other road to confront the car, he saw only one person in the car—a woman. He did get the license tag number. He called 911 and provided this tag number. Salvador could not identify Wilkins as the robber as he did not get a good look at the man during the fight although he pulled the hoodie and mask from the man. R. 49, ll. 1 – R. 55, ll. 16.

The store had a security surveillance system which Salvador had viewed. He described it as a fair and accurate depiction of the incident. Even after viewing the video which was state's Exhibit 16, he still could not identify Wilkins as the robber. He could only say it was a black male. R. 48, ll. 7 – R. 52, ll. 1 – 25.

When the police ran the car tag, it was registered to Enterprise Rent-A-Car. When Sergeant Matt Hutchins called the law enforcement line for Enterprise, he learned that the car had been rented to Trishaunda Rookard. The police found the car in the parking lot of the Enterprise Rent-a-Car on the Asheville Highway. R. 71, ll. 2 – R. 72, ll. 25.

Later, Sergeant Hutchins talked to Trishaunda Rookard and took a statement from her. She consented to a search of the home. She had a cell phone belonging to Wilkins and gave this to law enforcement. Sergeant Hutchins obtained a search warrant for the phone and a forensic exam was completed on the phone. R. 73, ll. 1 – R. 76, ll. 12.

Investigator William Gary's primary job with this investigation was to retrieve the video data from the computer for the Fast Fuel's surveillance system. The system was a "Geovision" system which meant that he had to meet with the store owner to obtain the data. Sergeant Gary recorded the data from the system to a flash drive and then transferred it to a CD to place into evidence. This CD was marked as State's Exhibit 16. Nothing had been done to alter this footage. R. 58, ll. 5 – R. 60, ll. 17.

In a pretrial motion, defense counsel moved to suppress the raw footage video and a second video that the state produced from the raw footage of State's Exhibit 16 by splicing different views together. This second video was created after the first trial which ended in a mistrial. This second video was confusing. There appeared to be something wrong with the raw footage video as it showed the attempted robber at one place on one camera and at the same instant he was 10 to 15 feet away at the door on a different camera. Counsel did not know if it were accidental or intentional. Also there were sixteen cameras listed but camera fifteen was missing. R. 6, ll. 1 – R. 17, ll. 18.

The solicitor argued that there were two issues. One was the raw footage security video that was simply copied directly from the store's security system, and the second issue was the second DVD which was a spliced version. R. 16, ll. 1 – 25.

The trial judge asked for the officer who obtained the videos to testify in the pretrial hearing. Sergeant William Gary testified that he copied the security video from the store

onto a 'thumb' drive and transferred to a CD to place into evidence. He did not alter this original. He did make the second video by choosing different parts from each camera and put those together in "somewhat of a sequence" that did overlap "a little bit" to make it easier to view on one screen instead of having to switch from camera to camera. R. 17, ll. 23 – R. 19, ll. 8.

On the raw footage, Sergeant Gary explained that there appeared to be a "glitch" in the security software which creates a lagging effect as some of the cameras were moving at different speeds. It was an anomaly in the software that caused a person to appear to be in two different places at the same time which physically was not possible. R. 19, ll. 9 – R. 20, ll. 25. When he was before the jury, defense counsel asked him about camera 15. The sergeant answered that he may not have selected it because it may have been an office view with no activity on it. Or he may have deselected it to save disk space. He did not remember what all the views were. R. 64, ll. 19 – R. 65, ll. 24.

On cross examination, Sergeant Gary explained that on the spliced video, he exported the segments when the attempted robber appeared. The sequences were not necessarily in order because there was an overlap in time and some of the cameras backed up in time. R. 21, ll. 1 – R. 32, ll. 19.

The judge questioned the sergeant's credentials for making the videos for forensic purposes as the sergeant had never testified to this before. He had made forensic videos for the sheriff's office. R. 32, ll. 20 – R. 35, ll. 12.

The state argued that when the case was tried before, only the raw footage security video was admitted. The previous trial judge, Judge Early, expressed dissatisfaction with the raw footage. That was the reason the state made the second spliced video to make it easy for

the jury to view “the footage that shoed the actual motion of the perpetrator inside the store.”

R. 33, ll. 7 – 14.

Defense counsel again moved to exclude the video including both disks or versions.

The judge denied the motion. R. 35, ll. 11 – R. 36, ll. 12. The judge said at the beginning of the hearing:

Here’s the thing: if it’s authentic and it shows what it shows, I have to let it in. If it’s apparently been tampered with now and I understand redaction and splicing and that sorta thing, but if it’s been tampered with so as to unduly prejudice this defendant, then I have to leave, I have to exclude it.....

R. 15, ll. 14 – 21.

In his testimony before the jury, Sergeant Gary explained how he copied the original raw footage onto a CD. When this raw footage video, State’s Exhibit 16, was admitted and published to the jury, defense counsel renewed his prior objection. The judge admitted the video “subject to defendant’s prior objection which was overruled.” R. 58, ll. 5 – R. 60, ll. 24.

Sergeant Gary then explained to the jury how he made the spliced video, State’s Exhibit 14. When it was admitted into evidence and published to the jury, defense counsel again renewed his prior objection. The judge admitted this second video “over the defendant’s prior objection.” R. 61, ll. 3 – R. 63, ll. 13.

During the trial, Trishaunda Rookard (Bennett) testified for the state that in April 2013, she was in a romantic relationship with Wilkins. He was the father of her child. R. 82, ll. 12 – R. 84, ll. 2. She had rented a car from Enterprise because her car had been damaged and was being repaired. On the day of the incident, she had gone with her mother to MUSC.

She left the car in the parking lot for her brother to return to Enterprise. She left the keys in the car. Wilkins called to borrow the car which she allowed. R. 84, ll. 3 – R. 85, ll. 25.

When she viewed the security video, she was not “absolutely positive” that the perpetrator was Wilkins as the video just looked similar to him. The solicitor then showed her State’s Exhibit 14 which was the sliced version of the video. She said it was not the best footage but it could be Wilkins if he were “pictured with a bald head.” Maybe it looked like him with a bald head. They had purchased a hoodie together at Wal-Mart. R. 86, ll. 1 – 130, ll. 13.

On cross-examination, Trishaunda said that Wilkins did not have a bald head during that time. The person on the security video looked bald-headed to her. R. 88, ll. 15 – R. 91, ll. 16.

Rachel Wells testified for the state that she dated Wilkins in April 2013. They had a sexual relationship. She thought theirs was an exclusive relationship as she was not involved with anyone else. She found out that he was seeing other people including a girl named Brittany. She admitted that she was a little bit in love with him at the time but she did not want to talk to him anymore. She said the attempted robber on the security video was Wilkins. She could tell by the structure of his face. She admitted, after viewing photos of Wilkins taken from his cell phone, that Wilkins had hair during the time of the incident. R. 93, ll. 3 - R. 102, ll. 9; R. 77, ll. 1 – R. 78, ll. 18.

Amanda Webb, he forensic DNA analyst at SLED, testified concerning DNA taken from the orange mask the perpetrator had. She obtained DNA samples from Wilkins and Salvador, the store clerk. She then compared these with cuttings from the mask. The blood

on the mask was a certain match to the clerk, Salvador, with a probability of one in six quadrillion. R. 116, ll. 13 – 25; R. 118, ll. 9 – R. 120, ll. 16.

She then did a general swab of the mask and found DNA from at least four people on the mask. Wilkins could not be excluded as a contributor meaning his DNA was present. However, the probability of that finding was one in forty-two. R. 120, ll. 22 – R. 121, ll. 21.

In his closing argument, the solicitor argued:

And, finally, what I think is the most damning and the strongest evidence in the case is the security video itself.

R. 140, ll. 13 – 15.

During jury deliberations, the jury sent a note asking to view the video “up close.” All agreed to this. R. 160, ll. 1 – R. 161, ll. 10; Court’s Exhibit One.

Following the verdict, defense counsel moved for a new trial. He reported that the jury did not get to view the security video again due to technical problems. The judge denied the motion. R. 167, ll. 15- R. 169, ll. 14.

During his mitigation presentation, defense counsel argued that this was a close case. He pointed out that at the first trial; there were eight jurors voting not guilty and one juror not voting. R. 171, ll. 19 – R. 172, ll. 11.

ARGUMENT

I

The trial court erred in admitting the second security video (State's Exhibit 14) from the Fast Fuel No. 8 convenience store which was a spliced version of the raw footage which the state prepared following a first mistrial when only the raw video tape was admitted, and the state's action was prejudicial to Appellant Wilkins because the state changed the evidence.

The admission of evidence is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (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. Id.

Rule 403, SCRE, provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

In Washington v. State, 406 Md. 642, 961 A.2d 1110 (Ct. App. Maryland 2008), the Court of Appeals granted cert from the Court of Special Appeals which had found that the trial court abused its discretion in admitting the videotape from the bar where the shooting occurred but that the error was harmless. The Court of Appeals reversed the Court of Special Appeals and remanded for a new trial finding that the error was not harmless. There was a shooting at a local bar but the victim would not identify the shooter. The surveillance video was needed for identification of the shooter who was determined to be Washington who was convicted of first degree assault. The Court of Appeals found that the surveillance video was not properly authenticated as it contained compiled images from the bar's eight security cameras. They were transferred to a CD by an

unknown person. There was no evidence as to the process used, the manner of operation of the cameras, reliability or authenticity of images, or chain of custody.

The Court held that the error was not harmless because the state relied heavily on the video for identification of shooter, and the prosecutor underscored the significance of the videotapes during his opening and closing arguments. The Court wrote:

Photographic manipulation, alterations, and fabrications are nothing new, nor are such changes unique to digital imaging, although it might be easier in this digital age. As noted by Professor Lynn McLain, "movies and tapes are easily manipulated, through such means as editing and changes of speed, to produce a **misleading** [emphasis added] effect." 5 LYNN MCLAIN, MARYLAND EVIDENCE Section 403.6 at 592 (2001).

The jury in Washington's case asked to view the video which was allowed. At trial, the victim identified Washington as the shooter because he had known Washington for three years.

The only difference between Washington's case and Wilkins is that the person who transferred the images was known. However, the clerk of the Fast Fuel did not know anything about the security system and how it operated. He said that the owner, Mr. Patel, was the one who knew. R. 54, ll. 1 – 12. Mr. Patel did not testify. R. 1-3. Sergeant Gary had to contact Mr. Patel to get access to the system. R. 66, ll. 5 – 18.

The trial court abused his discretion in admitting this spliced video, State's Exhibit 14, into evidence. It lacked reliability, was confusing, and was prejudicial to Wilkins. The first trial ended in a mistrial with eight jurors who voted not guilty. Only the raw footage video was shown. State's Exhibit 16. The state then changed the evidence hoping to make it easier for the jury to convict which they did. There was nothing in the record to indicate that any other evidence was different from the first trial. The clerk, Salvador, could not identify

Wilkins as the perpetrator even after being close to him during the altercation and pulling his hoodie and mask off. The DNA was miniscule and there were no identifiable prints. R. 108, ll.1- R. 110, ll.19; R. 121, ll. 1-21; R. 130 ll. 1-25.

Trishaunda Rookard, the mother of Wilkins' child, could not say for sure that it was him. Rachel Wells, who was in love with Wilkins initially, had reason to want to lie against Wilkins as he had done her wrong, seeing other women when she thought the relationship was exclusive. But both said Wilkins was not bald during that time and the perpetrator on the video appeared bald.

The jury was not sure about the identity of Wilkins as they requested to view the video up close indicating doubt. The solicitor argued in his closing argument that the video was the most "damning" piece of evidence. Sergeant Gary gave no testimony that he discussed with Mr. Patel, the owner of the store and one who knew about the security system, anything about the how the system worked other than retrieving the data from it.

Sergeant Gary said the sequences from the cameras were not in order. The views overlapped at times. Sergeant Gary made the decision on his own on which views from the cameras to select. There was no testimony that he consulted with anyone concerning what views or segments to take from each camera. He decided on his own not to retrieve camera 15.

Admitting this spliced video was prejudicial to Wilkins. The evidence against him was not overwhelming, and without this spliced video, there was a reasonable probability that the jury would have found him not guilty. The overwhelming majority of the first jury found him not guilty without this spliced video. State's Exhibit 14.

ARGUMENT

II

The trial court erred in admitting the original raw footage security video (State's Exhibit 16) from the Fast Fuel No. 8 convenience store because Camera 15 of the 16 cameras was missing, and the video was confusing as it showed the attempted robber in different places at the same time on different cameras.

The admission of evidence is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (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. Id.

Rule 403, SCRE, provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

In State v. King, 334 S.C.504, 514 S.E.2d 578 (1999), the Supreme Court reversed because the evidence of "other bad acts" was more prejudicial than probative because it showed the defendant's propensity to commit crimes. The solicitor in that case stressed this evidence in his closing argument to the jury. In finding reversible error, the Court noted that the evidence against King was basically circumstantial.

In Wilkins' case, the evidence was not overwhelming as the clerk could not identify him as the attempted robber, and the DNA evidence was weak. The raw footage video was the main evidence against him and it was confusing and unclear.

In State v. James, 355 S.C. 25, 583 S.E.2d 745 (2003), the Supreme Court ruled that the trial court erred in admitting seven prior burglary convictions of the defendant in his trial for burglary first degree. The Court found this prejudicial pursuant to Rule 403, SCRE, because the burglary statute for first degree only required two prior burglary convictions for first degree burglary. Therefore, the probative value of all seven prior burglary convictions was outweighed by the “very great potential for prejudice to the defendant regardless of the trial court’s limiting instruction.” This sound principle of law applies here as well.

This raw footage video was confusing and misleading to the jury. Sergeant Gary testified that there was a “glitch” in the software for this video. It made a person appear to be in two different places at the same time. Sergeant Gary was not sure what happened to camera 15 but assumed he just left it out due to space or maybe there was nothing on it. The fact that it was a confusing video was shown by the state making a spliced video from it in an effort to make it more presentable. But the spliced version was still confusing.

According to the state, Judge Early at the first trial thought the raw footage video was very poor. R. 33, ll. 7-14. At this trial which ended in the mistrial, eight jurors voted not guilty for Wilkins.

The jury in the second trial had problems with the video as they asked to see it up close. The record did not state which video the jury referred to so it is assumed they meant both since the record just said “video.” R. 160, ll. 1 – R. 161, ll. 10. However, the note had the word “edited” next to the question. Court’s Exhibit One. The jury was unable to see the video due to technical problems. R. 167, ll. 15 – R. 169, ll. 14.

The state did not call the owner of the Fast Fuel, Mr. Patel, to testify about the security although he was the only one who knew how the system operated. There was no reliable foundation for this raw footage video.

It was prejudicial to Wilkins especially when the solicitor argued in his closing to the jury that the video was the most "damning" piece of evidence.

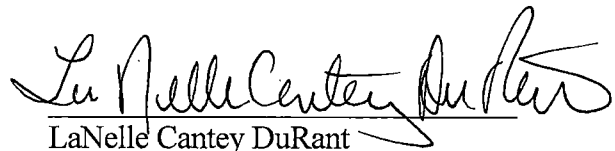
In State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991), the Supreme court held that relevant evidence may be excluded where its probative value is substantially outweighed by the danger of unfair prejudice.

Neither version of the security video should have been admitted.

CONCLUSION

Based on the above, Appellant Wilkins' conviction and sentence should be reversed, and his case remanded for a new trial with the security video being suppressed including State's Exhibits 14 and 16.

Respectfully submitted,

A handwritten signature in cursive script, reading "LaNelle Cantey DuRant". The signature is written in dark ink and is positioned above the printed name and title.

LaNelle Cantey DuRant
Appellate Defender

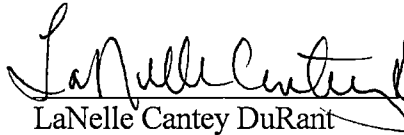
ATTORNEY FOR APPELLANT

This 17th day of December, 2015.

CERTIFICATE OF COUNSEL FOR APPELLANT

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."

December 17, 2015


LaNelle Cantey DuRant
Appellate Defender

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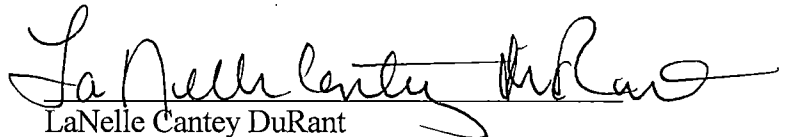
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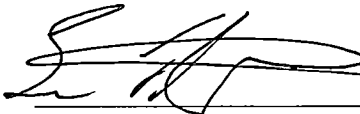
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Megan Harrigan Jameson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 17th day of December, 2015.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 17th day of December, 2015.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.