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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Lee S. Alford, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVID W. DOVER,

APPELLANT

APPELLATE CASE NO. 2014-002436

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by admitting testimony from an investigator about the homeowner's identification of Appellant in a photographic lineup hours after the alleged burglary since the testimony was hearsay when the homeowner was not questioned about his out-of-court identification during his testimony?

STATEMENT OF THE CASE

A York County Grand Jury indicted Appellant at the May 29, 2014 term of General Sessions for second degree burglary and petit larceny. R. 306. His case was called to trial on November 10, 2014 before the Honorable Lee S. Alford, and a jury. R. 1. Assistant Solicitors Jenny Desch and Christopher L. Jones represented the state, and Mindy Lipinski represented Appellant. R. 1.

On November 13, 2014, the jury acquitted Appellant of petit larceny, but found him guilty of second degree burglary. R. 304, ll. 6-15. Judge Alford sentenced him to eight years imprisonment. R. 305, ll. 18-23.

This appeal follows.

ARGUMENT

The court erred by admitting testimony from an investigator about the homeowner's identification of Appellant in a photographic lineup hours after the alleged burglary since the testimony was hearsay when the homeowner was not questioned about his out-of-court identification during his testimony.

Relevant Facts

The state alleged at trial that Appellant entered the home of Lucas Taylor in York, South Carolina on the afternoon of February 10, 2014 without his consent. Taylor testified that he picked up his children from school in downtown Rock Hill at 12:00 pm and then drove home. When he arrived home, he saw a pickup truck parked in his driveway. He claimed he had never seen this truck before. Taylor parked behind the truck and, as he was getting out of his car, he allegedly saw a man walking down the steps of his back porch carrying a television. R. 50, l. 10 – 52, l. 15. He claimed that when the man saw him, he took off running and eventually put the television down somewhere near the side of the house. R. 52, l. 14 – 53, l. 8. Taylor then met the man in the front yard and confronted him. According to Taylor, the man "was scared, half crying, begging me not to beat him up or call the cops." R. 53, ll. 9-13. Taylor told the man he "was going to do both," and then demanded the man carry his television back into the house and put it back where he found it. R. 53, l. 9 – 54, l. 5.

Taylor testified that the man did as he was told and picked up the television and carried it back into Taylor's bedroom where he had allegedly taken it from. Taylor told the man to put it on his bed as opposed to the stand where it had originally been located. After the man put the television down, Taylor tried to punch the man in the face "to knock his

teeth out," but the man "turned like a little girl" and Taylor ended up striking him in the ear. R. 54, ll. 3-21; R. 83, ll. 1-9. The man then took off running before Taylor "could hit him again" and fled in his truck. The man supposedly had to drive through the muddy yard and a wooded area to reach the road because Taylor's car was blocking his truck in the driveway. R. 54, l. 23 – 55, l. 21.

As the man was driving away, Taylor called 911 to report the alleged burglary and gave the dispatcher the man's license plate number. R. 55, l. 22 – 56, l. 5. Law enforcement arrived about fifteen to twenty minutes later. R. 112, ll. 18-22. Despite being told by the dispatcher not to reenter his house so as not to contaminate the scene, Taylor waited for the police inside and allowed his young children to go inside the home as well.

The man who entered Taylor's home was later identified as Appellant. Taylor claimed he did not know Appellant and had never seen him before. R. 77, ll. 8-9; R. 92, ll. 18-19. On cross-examination, defense counsel sought to show that Taylor fabricated the story about the alleged burglary and that the incident was really a dispute over a failed drug deal. However, Taylor denied seeing Appellant earlier that day, flagging him down, and asking him to come to his house. He further denied offering to trade Appellant his television in exchange for marijuana.[1] R. 93, ll. 1-9. Moreover, Taylor testified that he and

[1] Appellant gave an oral statement to law enforcement the evening of the alleged burglary. He told Investigator Kelly Lovelace that he went to Taylor's house that afternoon to facilitate a marijuana sale upon Taylor's request. Taylor sought to purchase marijuana from an unknown dealer and wanted to use his television as collateral because he did not have any cash to pay for the drugs. Appellant told Lovelace that he and Taylor argued over payment that resulted in a physical altercation. Appellant eventually fled the home. He denied being involved in a burglary and maintained that he entered Taylor's home with his consent. The state decided not to admit Appellant's statement into evidence because the solicitor believed it was self-serving. Defense counsel sought to admit Appellant's statement as a "statement against penal interest" pursuant to Rule 804(b)(3), SCRE, but the court ruled it was inadmissible under State v. Terry, 339 S.C.

Appellant do not have a friend named Jennifer in common and do not have tattoos designed by the same individual because his "tattooist wouldn't know a guy like that." He also said he has no idea how Appellant would know that he was involved in "MMA fighting or cage fighting." R. 84, ll. 1-17.

Additionally, Taylor testified that nothing else was taken from his home that day. He said the television Appellant allegedly tried to take was the thirty-two inch television located in the master bedroom. However, he acknowledged that he owned a larger forty-seven inch television that was in the living room that Appellant did not try to take. R. 93, l. 19 – 94, l. 5.

The law enforcement officers who dealt with Taylor that day said he "very agitated, very aggressive, [and] very angry" even several hours after the alleged burglary occurred. Investigator Kelly Lovelace testified that she "had a really hard time getting him to calm down where he [could] communicate with me." R. 214, l. 23 – 215, l. 3; R. 113, ll. 9-16. It appears Taylor continued to display this same demeanor throughout his testimony before the jury.

Shortly after law enforcement arrived at Taylor's residence, they traced the license plate number given by Taylor to Appellant and responded to Appellant's home, which was about four miles down the road. They found Appellant's truck, which matched the description given by Taylor, in the driveway. However, Appellant was not home. Appellant's truck allegedly had fresh mud on the tires. R. 115, ll. 9-25; R. 119, l. 18 – 121, l. 10.

352, 529 S.E.2d 274 (2000) and State v. Cabrera-Pena, 361 S.C. 372, 605 S.E.2d 522 (2004). See R. 4, l. 8 – 40, l. 19.

The Forensic Services Unit responded to Taylor's home to process the scene. Investigator Cheryl Gregory photographed parts of the inside and outside of the house. R. 150, l. 16 – 151, l. 11. She also processed the television Appellant allegedly carried and the exterior door to the master bedroom, which Taylor told her was where he saw Appellant leaving his house, for latent fingerprints.[2] R. 152, ll. 7-12; R. 169, ll. 12-15. She lifted two prints from the television that were later identified as Appellant's fingerprints. R. 193, ll. 2-10. Gregory admitted that she did not process any other room in the house. Instead, she limited her investigation solely to the master bedroom where the television was located because Taylor told her that nothing else was taken from the home and that it did not appear Appellant had entered any other area of the residence. R. 167, ll. 15-21. She further admitted that the scene could have been contaminated or altered by Taylor or his children since they had entered the home before law enforcement arrived. R. 167, l. 22 – 168, l. 9.

The jury deliberated for over six hours before it reached a verdict. During its deliberations, the jury requested to be recharged on the elements of second degree burglary and petit larceny. R. 296, ll. 1-5; See Court's Exhibit No. 3. After two and a half hours of deliberating, the jury informed the court that it was deadlock and announced its numerical division. They were divided ten to two in favor of guilt on the charge of second degree burglary and seven to five in favor of guilt for petit larceny. In response, Judge Alford gave

[2] There were four exterior doors to the house. R. 162, l. 24 – 163, l. 15. Taylor testified that he saw Appellant walking down the steps from his back porch, meaning Appellant would have left the home through the back door located by the porch. However, Gregory testified that Taylor told her he saw Appellant leaving the home through the exterior bedroom door located on the side of the house. Gregory only processed the exterior bedroom door for latent prints relying on what Taylor told her. R. 166, ll. 4-13; R. 169, ll. 12-15. There were no signs of forced entry at any of the exterior doors to the home.

the jury an Allen[3] charge. However, he never instructed the jury not disclose its numerical division in the future. R. 299, l. 11 – 302, l. 8; See Court's Exhibit No. 4. About an hour after the Allen charge was given, the jury requested to rehear Taylor's testimony. R. 302, l. 19 – 303, l. 5; See Court's Exhibit No. 5. After listening to Taylor's testimony, the jury ultimately reached a verdict about forty minutes later. It found Appellant guilty of second degree burglary, but acquitted him of petit larceny. R. 303, l. 20 – 14.

Objection and Ruling

During Investigator Kelly Lovelace's testimony, the assistant solicitor asked her about obtaining a photographic lineup to show to Taylor to see if he could positively identify Appellant as the man who entered his home. Lovelace testified that after she initially responded to Taylor's residence and later went to Appellant's home, she went back to her office to obtain a photographic lineup. She contacted SLED, who compiled a six person photographic lineup and sent it to her via email. She then went back to Taylor's home and showed him the lineup. This occurred around 2:48 pm on the afternoon of the alleged burglary. Lovelace testified that Taylor was able to select a photograph from the six person lineup. R. 211, l. 25 – 217, l. 24. When the assistant solicitor asked Lovelace which photograph Taylor selected, defense counsel objected under hearsay. She argued that Taylor's selection was an out-of-court statement being offered for the truth of the matter asserted and said, "Mr. Taylor didn't testify that he identified anyone." R. 217, l. 25 – 218, l. 3.

The assistant solicitor argued in return that Taylor had in fact testified about being shown a photographic lineup and his selection of Appellant in that lineup. The court agreed

[3] Allen v. United States, 164 U.S. 492 (1896)

with the solicitor that Taylor had testified about his selection of Appellant in the photographic lineup and overruled the objection. R. 218, ll. 4-6.

Lovelace then testified that Taylor selected photograph number two in the lineup, which was a picture of Appellant. She further explained, "After he [Taylor] saw the photo, he had a few expletives to say, and then he said that is the person that committed the offense. He was still very agitated and very angry." R. 218, ll. 7-20.

Discussion

The court erred by allowing Investigator Lovelace to testify about Taylor's out-of-court identification of Appellant in a photographic lineup hours after the alleged burglary because the testimony was hearsay when the solicitor never questioned Taylor about his identification during his testimony before the jury. Lovelace's testimony about Taylor's out-of-court identification was clearly used to prove the truth of the matter asserted: that Taylor identified Appellant on the day of the burglary as the man he saw leaving his house with his television in tow. Moreover, improperly allowing Lovelace to testify about Taylor's identification bolstered his credibility before the jury when his credibility was the key factor in the case.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE; See State v. Brockmeyer, 406 S.C. 324, 351, 751 S.E.2d 645, 659 (2013). "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute." Rule 802, SCRE.

The trial court erred when it allowed Lovelace to testify about Taylor's out-of-court identification of Appellant in the photographic lineup because such testimony was hearsay

and did not fail within any of the exceptions to the hearsay rule. The testimony was clearly being used by the state to prove Taylor had positively identified Appellant as the man who entered his home on the day of the alleged burglary. The assistant solicitor and the court were incorrect when they stated Taylor had been questioned about his identification during his testimony before the jury. In fact, a review of Taylor's testimony makes it clear that he never testified about the out-of-court identification during the trial. See R. 49, l. 17 – 94, l. 22.

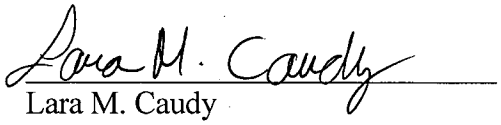
Because Taylor was never questioned about his out-of-court identification during his direct examination, Appellant was prevented from cross-examining him before the jury about his identification. This hearsay testimony was also prejudicial to Appellant because it bolstered Taylor's credibility when his credibility was the critical issue in the case. Based on the jury's lengthy deliberations, it is evident that it struggled with a verdict. The jury only reached a verdict after it reheard Taylor's testimony and the court gave an Allen charge.

Based on the trial court's error, Appellant respectfully requests this Court reverse his conviction and sentence and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his conviction and sentence and remand for a new trial.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 22nd 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 22, 2015

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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 J. Benjamin Aplin, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 22nd day of December, 2015.

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 22nd day of December, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.