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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

THE STATE,

RESPONDENT,

V.

XAVIER HEMINGWAY,

APPELLANT

APPELLATE CASE NO. 2014-002603

INITIAL BRIEF OF APPELLANT

BENJAMIN R. MATTHEWS
Matthews and Megna, LLC
3400 West Avenue
Columbia, SC 29203
803-799-1700

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS..... 1

TABLE OF AUTHORITIES 2

STATEMENT OF ISSUES ON APPEAL 3

STATEMENT OF THE CASE..... 4

ARGUMENT 5

CONCLUSION 9

TABLE OF AUTHORITIES

State v. Adams, 354 S.C. 361, 580 S.E.2d 785(Ct. App. 2003).

State v. King, 349 S.C. 142; 561 S.E.2d 640 (Ct. App. 2002).

State v. Roof, 196 S.C. 204; 12 S.E.2d 705.

State v. McConnell, 290 S.C. 278; 350 S.E.2d 179 (1986).

STATEMENT OF ISSUES ON APPEAL

Did the Court err in finding evidence that the Defendant possessed three Xbox 360s and three laptops was relevant and admissible when an investigating officer testified that the none of the laptops matched the serial number of the stolen Toshiba laptop and that the stolen Toshiba laptop was not among the laptops in the Defendant's possession?

Did the Court err in finding evidence that the Defendant possessed three Xbox 360s and three laptops was relevant and admissible when an investigating officer found that the laptops did not match the description of any of the stolen laptops and only two Xbox 360s were stolen?

Did the Court err in finding that "3 black Xbox 360s and 3 laptops" was sufficiently identical to two Xbox 360s with controllers, a Toshiba laptop, a Dell laptop and an Acer laptop as to be relevant testimony and admissible in light of the fact that the officer did not believe he had sufficient grounds to take the them into physical custody?

STATEMENT OF THE CASE

The Defendant was charged with two counts of burglary in the first degree, two counts of grand larceny and one count of safe cracking. Among the items stolen were two Xbox 360s, a Toshiba laptop, a Dell laptop and an Acer laptop. A permissible search of the Defendant's residence revealed three black Xbox 360s and three laptops. These items were not taken into custody at the time of the search and the items were not at the residence during a later search. No further description of the items is available and no photographs were taken. The victims did not see the items.

The Defendant gave a written statement that he did own three Xbox 360s, three laptop computers, and some shotgun chokes. A codefendant testified that the Defendant participated in the burglaries, safe cracking and received some of the stolen goods. He did not testify about what the Defendant received.

ARGUMENT

The Court erred in admitting portions of the Defendant's statement and police testimony that indicated he possessed Xboxes and laptops that were not relevant. The Court's ruling in a pretrial hearing regarding the test for admissibility of this evidence is correct. But the Court failed to follow its own ruling.

In a motion on the admissibility of the Defendant's statement the Court ruled that if the co-defendant "testifies that he and his cousin took these items, that they stored them at this trailer, and the officer says, we saw them there, and he can sufficiently identify them (emphasis added) ... that inculpates him." (Transcript pg. 68 ln 24 – pg. 69 ln 6.) "Without that causal link, there is no relevance..." (Transcript pg 69 ln 14-15.)

Under Rule 401, SCRE, evidence is relevant if has a direct bearing upon and tends to establish or make more or less probable the matter in controversy. State v. Adams, 354 S.C. 361, 580 S.E.2d 785(Ct. App. 2003); State v. King, 349 S.C. 142; 561 S.E.2d 640 (Ct. App. 2002).

In order for the statement to be admissible, the Court required that the co-defendant testify that he and the defendant took the items. The co-defendant testified that many items were stolen with several people including the Defendant.

The Court required that the codefendant testify that the stolen items were stored at the Defendant's trailer. The co-defendant testified that the stolen items were taken to the Defendant's residence and divided. He did not testify as to what particular items the Defendant received.

The Court also required that the officer testify that he saw the items in the Defendant's statement in the trailer. The officer testified that he found three Xbox 360s and three laptops in

the residence of the Defendant. Two Xbox 360s and two laptops, a Toshiba, a Dell and an Acer notebook, were among the items stolen.

The last requirement of the Court's ruling was that the items be sufficiently identified. This is where the Court errs. None of the items were sufficiently identified as items that were stolen from the victims or by the Defendant or co-defendant. While the possession of recently stolen property creates a presumption of fact that the one found in possession is a thief, State v. Roof, 196 S.C. 204; 12 S.E.2d 705. Possession of property that is not stolen should not carry the same presumption.

In his statement, the Defendant admits to possessing Xboxes, laptops, and three or four chokes. (Transcript pg. 50, ln 14-19.) During his permissible search, Officer Elliot found three black Xbox 360s, three laptop computers, a mini-motorcycle and two chokes. The officer did not take any of these items into custody because "he didn't feel he had sufficient information." (Transcript pg. 64 ln 14-15.) The officer testified that he couldn't distinguish the Xboxes from any other ones and, therefore, he didn't take any property into custody.. (Transcript pg. 351 ln 10-15) When he returned to the residence on a later date, the items were no longer there. The court redacts the references in the Defendant's statement to the chokes because there was no evidence of these being stolen. But admits the portion of the statement regarding Xboxes and laptops because similar items were stolen. The Court decides that the Xboxes and laptops are "sufficiently identified" even though the officer who discovered them did not. The officer tried to call the victims to see if they could come identify any of the items but was unsuccessful. Officer Elliott ran the serial numbers through dispatch and they did not come back as stolen. (Transcript pg. 403, ln 9 -10.) He also had a "pretty good" description of the stolen computers. (Transcript pg. 335 ln 22-25) Using the descriptions, the officer decided that he didn't have

enough information to take the items into temporary custody. He didn't even take pictures of the items. (Transcript pg. 53 ln 3-4.) Yet the Court finds these items that didn't return a match on their serial numbers or resemble a "pretty good" description, that were indistinguishable for any others and, that weren't worthy of a photograph by the investigating officer, to be sufficiently identified to the stolen items as to be relevant.

At the time of the search, Officer Elliot knew that a Toshiba, Acer and Dell laptops had been stolen. He knew that the serial number for the Toshiba had been entered into the system. When the serial numbers were run by dispatch for Officer Elliott, the Toshiba number did not appear. The stolen Toshiba laptop was not among the three laptops at the defendant's residence. (Transcript pg. 382 ln 20-24 and pg. 403 ln 9-10). Officer Elliott further testified that if there had been an Acer or Dell computer among the laptops at the defendant's residence he would have recognized them as possibly being stolen. (Transcript pg. 384 ln 24 – pg. 385 ln 15). The record is devoid of any evidence that the three laptops at the Defendant's residence were stolen. The only evidence is that they were not stolen because the serial number didn't match and the brands didn't match.

Officer Elliot testified that he found three black Xbox 360s during his search of the defendant's residence. While multiple game systems were stolen from these victims, only two were Xbox 360s. The officer provides no other description for the systems he found. He doesn't give their condition. He doesn't describe any dents, scratches, or stickers that might help identify a particular machine. He doesn't state whether they had controllers or games with them although these were included in the descriptions of the stolen items. He can't identify which two, if any, were stolen. An officer who thought he had found stolen items would have done a lot more than Officer Elliott did. Officer Elliott acted properly. He had no evidence that the mini

motorcycle, the chokes or the laptops were stolen. In light of that, he knew that the likelihood that two of the three Xbox 360s were stolen was very low. If he couldn't identify any of these items as possibly being stolen, how can they be relevant evidence?

In State v. McConnell, 290 S.C. 278; 350 S.E.2d 179 (1986), the South Carolina Supreme Court held that it was error to admit evidence about bullets of a different caliber than those used in that crime that were in the possession of the defendant. They were not related to the alleged crime. It is clear that the laptops at the defendant's home had no relationship to the alleged crime. It is error to admit evidence about the defendant's laptops because they were not the stolen laptops in this case.

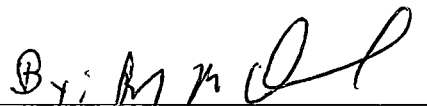
Even if the evidence did not show that the laptops were not stolen, there is no evidence that links them or the Xboxes to the crime. The co-defendant does not testify that the Defendant received the stolen laptops or Xboxes. The officer who is the only witness to see the items in the Defendant's residence, cannot distinguish them from any others and his descriptions are so poor as to prevent any possible identification. Had the state in McConnell had bullets without their caliber, would they then have been admissible?

CONCLUSION

Correctly interpreting the law, the trial court required that there be an identity between items stolen during the crime with which the Defendant is charged and the items discovered in his residence and included in his statement before the admission of the fruits of the search or statement could be admitted. The trial court erred in holding that there was sufficient identity between the items to admit the evidence as relevant.

The trial court correctly held that there was no evidence that a mini motorcycle or shotgun chokes were stolen. There is no evidence relating the three Xbox 360s at the Defendant's residence to the two stolen Xbox 360s. And there is uncontested evidence that the three laptop computers in the possession of the defendant were not stolen at all. The Defendant's statement and officer's testimony must be irrelevant and their admission is error.

Respectfully submitted,



Benjamin R. Matthews
Matthews and Megna, LLC

ROBERT M. DUDEK
Chief Appellate Defender

ATTORNEYS FOR APPELLANT

This 6th day of January, 2016.

STATE OF SOUTH CAROLINA
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CERTIFICATE OF SERVICE


The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter 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 6th day of January, 2016.



ROBERT M. DUDEK
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
This 6th day of January, 2016.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.