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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
The Honorable Steven H. John, Circuit Court Judge

Appellate Case No. 2014-002447

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SC Court of Appeals

THE STATE,

Respondent,

v.

JAMES EDDIE BAILEY,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The circuit court properly denied Appellant's untimely request for a spoliation jury charge in this case because the State did not destroy the dashboard camera's videotape in bad faith, and there was no indication the videotape contained exculpatory evidence.

STATEMENT OF THE CASE

Appellant was indicted for armed robbery, kidnapping, possession of a weapon during the commission of a violent crime, and resisting arrest on October 22, 2013, by a Greenville County grand jury. A jury found Appellant guilty of all charges after a trial before the Honorable Steven H. John. (R. p. 1.)[1] Symmes Watkins Culbertson, Esquire represented Appellant, and Allen Fretwell, Esquire represented the State. Judge John sentenced Appellant to one year imprisonment for resisting arrest, five years for possession of a weapon during a violent crime, and life imprisonment without the possibility of parole for armed robbery and kidnapping. (R. p. 124, line 24- p. 125, line 20.) Appellant filed a timely Notice of Appeal, and this Appeal follows.

[1] The trial took place over three days in October of 2014.

STATEMENT OF FACTS

On the evening of April 14th, 2013, Sharon Taylor, the manager of a Greenville Dollar General, was preparing to close the store for the night. (R. p. 31, line 2-25 and p. R. Supp. p. 1, line 1-14.) Taylor had not been scheduled to work and was on vacation, but she agreed to come in around 6:30 pm, when the manager who was scheduled that evening quit suddenly. (R. p. 31, lines 12-19.) Because she was not expecting to be called in to work, and she lived a long distance away, Taylor was accompanied to the store by her boyfriend, Tom Nash, who would wait for her until the end of her shift. (R. Supp. p. 1, lines 5-10.) Also working that evening was Karen Nartowicz, a cashier at the Dollar General. (R. p. 30, lines 21-25.)

At around 8:55 pm, Taylor noticed a few customers still shopping in the store, including Appellant, who entered and asked Nartowicz about pet food. (R. p. 32, lines 18-20.) Her boyfriend Nash was helping another female shopper carry her bags to her car outside. (R. p. 17, lines 2-6.) Appellant lingered in the back corner of the store, which Taylor found unusual because the pet food was located in a different area. (R. p. 32, lines 18-20.) Taylor asked Appellant if he needed any help, but he declined, so she stepped into the office for a few minutes. (R. p.32, lines 21-25.) As she exited the office, she heard Appellant ask Nartowicz where "the other lady was." (R p. 33, line 14.) Taylor asked him how she could help him, and he responded he needed help with some snacks. (R. p. 33, lines 17-20.)

Taylor was immediately uncomfortable with Appellant's request, because the snacks were clearly visible. (R. p. 33, lines 19-23.) Taylor stayed behind Appellant as she directed him down the aisle, but he turned and grabbed her by the hair, held a knife to her side, and dragged her to the back hall. (R. p. 34, lines 1-3.) Appellant threw Taylor to the

floor and held her down at knifepoint, telling her "this is a robbery and I'll kill you." (R. p. 34, lines 3-5.)

Nartowicz heard the commotion and told Nash, who had just returned inside from helping the customer to her car. (R. p. 17, lines 2-14.) Nash saw Appellant on the floor with Taylor, with one arm wrapped around her side, and the other holding her head back. (R. p. 18, lines 6-10.). Taylor attempted to grab a can of soup to hit Appellant, but Nash told her to stop for fear of angering Appellant. (R. p. 19, lines 10-17.) Appellant told Nash he wanted money and told him to go to the cash register to get it or he would kill Taylor. (R. p. 34, lines 20-24.) Appellant began to cut Taylor across her throat. (R. p. 34, lines 22-23.)

Nash took twenty- two dollars from the cash register. (R. p. 21, lines 5-9.) Nartowicz was speaking to the 911 operator and handed Nash the phone. (R. p. 21, lines 10-14.) The operator told Nash the police were on the way. (R. p. 21, lines 13-14.) When Nash returned to Appellant and Taylor, he gave Appellant the money and told him the police were coming. (R. p. 35, lines 5-7.) Appellant released Taylor but told her to stay on the floor. (R. p. 35, lines 8-10.). As he walked to the front of the store, he noticed Nartowicz on the phone and motioned toward her. (R. p. 22, lines 6-10.) Nash told him to leave and held open the front door. (R. p. 22, line 11.)

As Appellant stepped out of the front door, he noticed the police car that had just arrived on the scene. (R. p. 22, lines 17-18.) Master Deputy Nathaniel Emily, of the Greenville County Sheriff's Department, was approximately two miles away when the call went out from dispatch, so he was able to arrive at the Dollar General within thirty or forty-five seconds. (R. p. 36, lines 1-2 and p. 37, lines 5-7.) Emily parked the patrol car facing the store, with his blue lights and siren extinguished. (R. p. 38, lines 13-22.) A

spotlight over the front door of the Dollar General shone down and illuminated the entrance. (R. p. 39, lines 14-19.) As Emily exited his vehicle, he noticed Appellant, who matched the description given by dispatch, and Nash at the front door of the store. (R. p. 39, lines 2-13.) Emily drew his sidearm and shouted at Appellant to put his hands up. (R. p. 39, lines 6-7.) Emily was able to see the knife in Appellant's left gloved hand and what appeared to be wadded up paper or cash in his right gloved hand. (R. p. 41, lines 6-13).

Appellant ran away, and Emily followed in foot pursuit. (R. p. 41, lines 19-21.) Emily's dashboard camera recorded his approach to the Dollar General and continued to record after he parked his patrol car. (R. p. 44, lines 12-19.) The video was entered into evidence at trial. (R. p. 45, line 24.) As Emily chased Appellant, he radioed the suspect's description to dispatch. (R. p. 42, lines 8-10.) Emily chased Appellant through several parking lots, and kept the other responding units apprised of their location. (R. p. 42, lines 8-25 and p. 43, lines 1-12.) Emily used his flashlight to illuminate Appellant running ahead of him. (R. p. 43, lines 15-17.)

Deputy Giovanni, also with the Greenville County Sheriff's Department, heard the call go out from dispatch and aided in the pursuit. (R. p. 54, lines 22-25.) Giovanni's dashboard camera activated at the same time as his blue lights, and recorded his drive to the scene. (R. p. 55, lines 17-25 and p. 56, lines 1-5.) When Deputy Giovanni parked his car, however, Appellant was already behind a nearby church, and Giovanni lost sight of him for a few seconds. (R. p. 58, lines 9-13.) Giovanni spotted Appellant walking away, and called out to him. (R. p. 58, lines 16-22.) Appellant continued to walk away after Giovanni repeated his calls, so the deputy deployed his taser on Appellant. (R. p. 59, lines 4-7.) Giovanni later reviewed his dashboard camera with his Sergeant, and because

Appellant was never in view of the camera, he determined the video had no evidentiary value and it was erased. (R p. 56, lines 6-16.)

Deputy Mathew May was also on scene to assist in the arrest. (R. p. 63, lines 24-25.) Appellant fell to the ground when Deputy Giovanni tased him. After the five second cycle finished, Giovanni and May attempted to take custody of him. (R. p. 60, lines 2-7.) While Appellant was on the ground, Giovanni and Deputy May struggled to pull his hands out from under him to place him in handcuffs. (R. p. 61, lines 4-19.) Appellant resisted, and refused to put his hands behind his back. (R. p. 62, lines 12-14.) Eventually the deputies were able to pull his hands from underneath him, and they discovered Appellant was still holding the knife. (R. p. 62, lines 20-22.) During the search incident to Appellant's arrest, deputies found twenty two dollars in cash in his front right pocket, gloves, a piece of black cloth with string attached, and his wallet in his rear right pocket. (R. p.. 64, lines 1-25 and p. 65, lines 1-25.)

ARGUMENT

The circuit court properly denied Appellant's untimely request for a spoliation jury charge in this case because the State did not destroy the dashboard camera's videotape in bad faith, and there was no indication the videotape contained exculpatory evidence.

Appellant argues the trial judge committed reversible error when he refused to charge the jury on a spoliation of evidence inference. Appellant waived his objection to the charge given at trial, however, by failing to make his request in a timely manner. Further, Appellant presented no evidence of bad faith by the State, nor indicated any exculpatory value of the missing evidence to warrant such a charge. His argument, therefore, is without merit.

Improper Objection Under Rule 20

At trial, Appellant only discussed two issues before the judge charged the jury, and those involved circumstantial evidence and the distinction among the four charged crimes. (R. p. 66, lines 10-13 and p. 67, lines 4-5.) After the judge gave the jury instructions, he again asked for objections. Appellant replied ""your honor, quite honestly, it's one of the better charges I've heard in a long time." (R. p. 102, lines 4-5.) His request to the trial court judge for the spoliation charge was made the following day, while the jury was in deliberations. (R. p. 105, lines 8-17.) As for why the issue was not raised previously, counsel conceded, "I did not have that thought in my head." (R. p. 105, lines 16-17.)

Rule 20 of the South Carolina Rules of Criminal Procedure states:

> **(a) Time for Request.** All requests for legal instructions to the jury shall be submitted *at the close of the evidence*, or at such earlier time as the trial judge shall reasonably direct. All requests must include accurate citation to authorities relied upon.

> **(b) Objections to Charge.** Notwithstanding any request for legal instructions, the parties shall be given the opportunity to object to the giving or failure to give an instruction *before the jury retires*, but out of the hearing of the jury. Any objection shall state distinctly the matter objected to and the grounds for objection. *Failure to object in accordance with this rule shall constitute a waiver of objection*

(emphasis added.) The solicitor properly pointed out that the addition of the charge after the jury began deliberations would improperly highlight the issue, giving the charge more weight than it deserved. (R. p. 106, lines 18-24.) Appellant failed to object when given the opportunity before and after the jury was charged at the close of evidence, and he made his motion well after the jury retired.

Any error should be called to the attention of the judge at the conclusion of the charge in the absence of the jury; a party who fails to object at that time cannot later complain. Thomas-McCain, Inc. v. Siter, 268 S.C. 193, 199, 232 S.E.2d 728, 730 (1977). Moreover, to be timely, an objection to the trial court's oral charge, with grounds for the objection, must be made before the jury retires to consider its verdict and must be stated with sufficient clarity or specificity to preserve the error. Am. Cast Iron Pipe Co. v. Williams, 591 So.2d 854, 856 (Ala. 1991). Thus, in accordance with the Rules of Criminal Procedure and the common law, Appellant's request for the jury charge was untimely, and his objection was therefore waived.

Failure to Show Bad Faith or Exculpatory Value

Appellant contends the circuit court erred in denying his request for a spoliation of evidence jury charge and therefore violated his due process rights. He argues a spoliation charge was mandated by Deputy Giovanni's failure to preserve the dashboard camera videotape from the night he was arrested.

As the trial judge noted, the State does not have an absolute duty to preserve potentially useful evidence, and a defendant must demonstrate either: 1) the State destroyed evidence in bad faith; or 2) the evidence's exculpatory value was readily apparent before the evidence was destroyed, and the defendant cannot obtain other evidence of comparable value by other means. State v. Moses, 390 S.C. 502, 702 S.E.2d 395, 404 (Ct. App. 2010) (R. p. 107, lines 11-25 and 108, lines 1-3.) The bad faith requirement limits the extent of the State's obligation to preserve evidence to reasonable bounds, and confines it to cases in which the police conduct indicates the evidence could form a basis for exonerating the defendant. Arizona v. Youngblood, 488 U.S. 51, 58 (1988); Moses, 702 S.E.2d at 403.

As a threshold matter, the videotape was "potentially" useful evidence, at best, although Appellant offers no suggestion how it might be useful, and the State did not have an absolute duty to preserve it. Therefore, Appellant must show either bad faith by the police, or the videotape had "readily apparent" exculpatory value before it was taped over. The State submits he cannot meet either prong of the spoliation analysis, and therefore, a spoliation jury charge was not warranted in this case.

Significantly, Appellant does not contend the videotape was intentionally destroyed to avoid revealing exculpatory evidence. Rather, he argues the decision by Giovanni and his supervisor to review and erase the tape was inappropriate police procedure tantamount to bad faith. (Appellant's Brief p. 10.) The evidence presented at trial, however, contradicts his argument. Giovanni and his supervisor reviewed the video, saw Appellant never appeared on camera, and therefore they believed the tape had no evidentiary value. (R. Supp. p. 2, lines 11-23.)

Giovanni testified he was the second officer on scene, and Appellant was out of his line of sight when he parked his patrol car. (R. p. 58, lines 1-10.) The trial court judge found "zero" evidence the State destroyed the videotape in bad faith. (R. p. 108, lines 7-8.) Thus, Appellant clearly cannot meet the first prong of the spoliation analysis.

Appellant contends because he has no knowledge of what evidence the video may have shown, a conclusion the tape contained exculpatory evidence is required. Appellant cannot even speculate the videotape had any exculpatory value, much less "readily apparent" exculpatory value. On the contrary, both Giovanni and Emily testified Appellant matched the suspect's description, ran from the police, and continued to resist arrest. The dashboard videotape from Emily's patrol car, which was more probative and relevant, was entered into evidence.

In the absence of bad faith or exculpatory value, the State was not required to preserve the videotape. Appellant essentially contends he was entitled to a spoliation charge simply because the videotape was no longer available. Mandating a spoliation charge under the circumstances of this case effectively eviscerates the limits established in Youngblood, and adopted by the courts of South Carolina in Moses. In essence, defendants would be entitled to the spoliation jury charge even in cases where the State would not be required by law to preserve the evidence at issue, simply because the defense claims the evidence was "potentially" useful, even if there is no indication the evidence had exculpatory value. Such a result imposes an unwarranted burden on the State, which will face the negative inference of a spoliation charge based on nothing more than a defendant's conclusory claim particular evidence might have helped the defense.

Further, specifically instructing the jury it may infer the videotape in this case was adverse to the State would be tantamount to a prohibited charge on the facts. S.C. Const. Art. V, §21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."). It is undisputed the videotape footage from the night Appellant was arrested was no longer available only because the deputy and his supervisor taped over it in the ordinary course of business. Even if stated as a permissible inference, a specific jury charge regarding the unavailable videotape would improperly focus on the fact the videotape was unavailable.

Appellant questioned witnesses about the missing videotape, and he argued in closing that the missing videotape created reasonable doubt. (R. Supp. p. 2, lines 11-25, p. 3, lines 1-13; R. p. 178, lines 9-16.). The circuit court properly instructed the jury it was the sole judge of the facts and the witnesses' credibility. (R. p. 91, lines 18-24). The jury knew about the missing videotape and was free to give the missing videotape whatever weight the jurors deemed necessary.

In the absence of evidence indicating State misconduct, or that the videotape had any exculpatory value, the Appellant was not entitled to the spoliation jury charge. The circuit court properly denied Appellant's untimely request, and his conviction should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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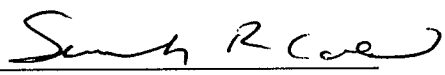
BY: 
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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent 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."

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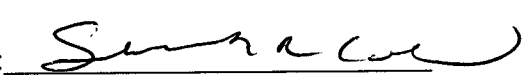
BY: 

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PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Final Brief of Respondent on Appellant 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 8th day of September, 2015.

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