

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

J. Mark Hayes, II, Circuit Court Judge

ORIGINAL

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

JUSTIN DRU FAILE,

APPELLANT

APPELLATE CASE NO. 2015-000305

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in admitting the in-car video of Sergeant Lee Wright, when the Appellant's actions that gave rise to the indictments were already completed prior to Sergeant Wright's arrival at the scene, and the probative value of the content of the video was substantially outweighed by the danger of unfair prejudice?

2. Did the trial court err in admitting the 911 call made by a witness, when the probative value of the content of the 911 call was substantially outweighed by the danger of unfair prejudice because the content was cumulative and provocative, and the content was not probative as to whether the Appellant acted in self-defense?

STATEMENT OF THE CASE

Appellant was indicted by the York County Grand Jury for pointing and presenting, possession of a firearm during the commission of a violent crime, and three counts of attempted murder. *Transcr. pg. 6*. His case was called to trial on February 9, 2015 before the Honorable J. Mark Hayes. *Transcr. pg. 1*. At trial, the State elected to proceed only on one count of attempted murder, and one count of assault and battery of a high and aggravated nature. *Transcr. pg. 6-7*. Melissa Inzerillo represented the Appellant. Christopher Epting was the assistant solicitor.

On February 12, 2015, the jury found the Appellant guilty of two counts of assault and battery of a high and aggravated nature. *Transcr. pg. 470*. Justin was sentenced for twenty years at the Department of Corrections. That will be suspended upon the service of nine years and the service of five years of supervision. He was given credit for four hundred and twenty five days of time served prior to the hearing. *Transcr. pg. 479*.

This appeal follows.

STATEMENT OF FACTS

There was a birthday party going on at Palmetto Sports Bar, and Zachary Cleveland was there, having drinks and playing pool. *Transcr. pg. 70.* Zack Cleveland escorted out his cousin, and they got into a truck. *Id.* They were followed by Sam Fitcher, who walked up to the truck, reached into the passenger seat and began to punch the guy in the truck. *Id.*

Justin didn't even know that was going to happen. *Transcr. pg. 70.* The guy in the truck got out, the driver got out and came around the side of the truck. *Id.* Justin Faile pulled the gun. Justin Faile started walking backwards when he pulled the gun. *Transcr. pg. 418, 429.* After that shots were fired people were shot. After he shot in self-defense, he was dog piled. *Transcr. pg. 76.* When he pulled the gun, no shots were fired until he was hit. Bobby Trader ran across the parking lot and blind-sided a man holding a gun. He was shot after that. *Id.* The second round of shots came after Mr. Faile was beaten mercilessly by a number of people for ninety seconds to two minutes. *Id.*

When the officers arrived on the scene Mr. Faile was being held down by a lay person, Mr. Henson, and there were several people yelling out to law enforcement that the Appellant was the shooter. *Transcr. pg. 43.* Mr. Faile was unconscious at this time and Sergeant Wright and Deputy Davis determined the identity of the Appellant by viewing the identification contained in his wallet. *Id.*

The trial strategy of trial counsel for the Appellant relied almost exclusively on the grounds of self-defense. During opening arguments, defense counsel repeatedly confirmed that the Appellant admitted to the shooting. Defense counsel conceded that, "You won't hear a dispute from the defense in this case that Bobby Trader was shot. You won't hear a dispute [...] that Zachary Cleveland was shot. What you *will* hear from the defense in this

case is that Justin Faile shot only in self defense.” *Transcr. pg. 75, para. 19-23* (emphasis added). Later during opening arguments, defense counsel reiterated, “There was no intent to kill. Mr. Faile fired in self defense.” *Transcr. pg. 76, para. 11-12*. Defense counsel concluded his opening his arguments by stating, “This isn’t a case about what. There was a shooting on December 13th at the Palmetto Sports Bar. *Mr. Faile was the shooter*. The issue is why. Thank you.” *Transcr. pg. 77, para. 2-4* (emphasis added).

The first witness called by the state was Sergeant Lee Wright. *Transcr. pg. 77, para. 5-8*. By the time Sergeant Wright arrived at the scene, the Appellant was unconscious. *Transcr. pg. 79, para. 16-20*. At trial, Wright testified to arriving at the scene with “blue lights and sirens,” *Transcr. pg. 78, para. 19*, that the scene was “very hectic,” *id at pg. 79, para 12*, and that there “was a lot of blood,” *id at pg. 80, para. 6-7*. Counsel for the state asked Mr. Wright to describe the appearance of one of the victims, and he replied, “I mean he was covered in blood. It appeared that there were multiple shots. He was in pain, you know, yelling. I could just imagine what I would feel like if I had been shot.” *Id., at pg. 80, para. 21-24*. Mr. Wright also testified that there were “shell casings” on the ground. *Transcr. pg. 82, para. 3*.

At trial, the state sought to introduce the in-car video of Sergeant Lee Wright, even though Mr. Wright did not arrive until the Appellant was already unconscious and even though Mr. Wright had already described the appearance of the scene upon his arrival. Defense counsel objected on multiple grounds, including her objection to conversations “intended to arouse the sympathy and emotion of the jury.” *Transcr. pg. 86, para. 14-15*.

The trial judge allowed the in-car video to be published to the jury over defense counsel’s objection. Even though the Appellant admitted to shooting the victims, the trial

judge reasoned that “as far as the issue of the blood, my understanding of *the disputed issues* that are going to be in this case, I think there is common sense would be there will be blood there [sic].” *Transcr. pg. 88, para. 1-3, 15-18* (emphasis added). The in-car video showed conversations that Sergeant Wright had with the Appellant, the victim Bobby Trader, and also included video of victim Zachary Cleveland getting loaded into an ambulance. *Transcr. pg. 91-92.*

Throughout the presentation of the state’s case at trial, the state repeatedly referenced substantial blood loss at the scene. Investigator Kevin Sullivan described “a large pool of blood that was found in the parking lot,” and his comments were allowed into evidence over the objection of defense counsel. *Transcr. pg. 235, para. 22 to pg. 236, para. 4.* Mr. Sullivan references “a large pool of blood” a second time shortly later. *Transcr. pg. 237, para. 25.* Mr. Sullivan also testified to the bullet casings and shells, confirming that “there were twelve cartridge casings recovered from the scene,” *id at pg. 235, para. 8-9*, and later directing his direct examination he responded to a question from counsel for the state by reiterating that “there were twelve cartridge casings recovered from the parking lot,” *id at pg. 237, para. 22-23.*

In addition to multiple references to blood loss, the state introduced cumulative evidence of the injuries sustained by the victims, even though the defense conceded that the Appellant was responsible for the shots that caused the wounds. The state used the direct examination of Bobby Trader to introduce photographs of his wounds when the photographs were taken more than a month after the incident. *Transcr. pg. 272, para. 3-8.*

Near the close of the state’s case, the state sought to introduce a 911 call over the objection of defense counsel. Defense counsel objected because there was “a lot of sounds

and activity in the background,” including “medical advice being given,” which defense counsel contended would be “irrelevant and [...] prejudicial.” *Transcr. pg. 328, para. 22 to transcr. pg. 329, para. 5*. Although the Appellant admitted to shooting Bobby Trader and Zachary Cleveland, the state argued that the introduction of the 911 call was probative because the background noise included the caller’s conversation with Bobby Trader where he indicates he was shot, and contained live audio recordings of the gun shots referenced throughout the case. *Transcr. pg. 329, para. 13-22*. The trial judge allowed the 911 call to be admitted over defense counsel’s objection. *Transcr. pg. 331*. The transcript of the record does not contain any analysis by the trial court as to whether the probative value of the evidence provided by the 911 call is outweighed by the danger of unfair prejudice. *See transcr. pg. 328-331*.

At the close of the state’s case, defense counsel moved to renew all previous objections and motions. *Transcr. pg. 337, para. 14-16*. After the defense concluded its case, defense counsel again moved to renew all previous motions and objections, including a motion for a directed verdict. *Transcr. pg. 402, para. 1-3*. The jury later handed down its verdict, and afterwards, defense counsel again moved for a new trial and moved to renew all previous motions and objections. *Transcr. pg. 472, para. 16-18*.

ARGUMENT

1. The trial court erred in admitting the in-car video of Sergeant Lee Wright, because the Appellant's actions that gave rise to the indictments were already completed prior to Sergeant Wright's arrival at the scene, and the probative value of the content of the video was substantially outweighed by the danger of unfair prejudice.

A trial court's admission of evidence is within the court's discretion and the admission of evidence is to be reversed on appeal only if the trial court abuses its discretion. *See State v. Dickerson*, 395 S.C. 101, 116; 716 S.E.2d 895, 903 (2011).

Rule 403 provides that "although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." *SCRE, Rule 403*. Unfair prejudice is "an undue tendency to suggest decision on an improper basis." *State v. Gilchrist*, 329 S.C. 621, 627; 496 S.E.2d 424, 427 (Ct. App. 1998). A determination regarding whether the probative value of relevant evidence is substantially outweighed by the danger of unfair prejudice "must be based on the entire record and will turn on the facts of each case." *State v. Lyles*, 379 S.C. 328, 338; 665 S.E.2d 201, 206 (Ct. App. 2008).

Error by the trial court will not warrant reversal if the error is harmless beyond a reasonable doubt, such that the error did not contribute to the verdict obtained. *See Arnold v. State*, 309 S.C. 157; 420 S.E.2d 834 (1992). "In applying the harmless error rule, the court must be able to declare the error had little, if any, likelihood of having changed the result of the trial and the court must be able to declare such belief beyond a reasonable doubt." *State v. Watts*, 321 S.C. 158, 165; 467 S.E.2d 272, 277 (Ct. App. 1996) (citing *Chapman v. California*, 386 U.S. 18 (1967)).

In *State v. Collins*, 398 S.C. 197; 727 S.E.2d 751 (Ct. App. 2012), *result reversed at* 409 S.C. 524; 763 S.E.2d 22 (2014), the result of the initial trial was that the jury convicted the defendant of involuntary manslaughter and three counts of owning a dangerous animal. 398 S.C. 197, 201; 727 S.E.2d 751, 753. At trial, the defense conceded that an attack by the defendant's dogs caused bodily injury to a human being, and the appellate court noted that this issue "was never in dispute." 398 S.C. 197, 203; 727 S.E.2d 751, 755. Nonetheless, the trial court admitted seven photos of the injured boy's body that were taken by a forensic pathologist prior to the autopsy. 398 S.C. 197, 201-202; 727 S.E.2d 751, 754. While noting that the photos did have some probative value, the appellate court emphasized that the photos were "of little significance" in regards to the primary issues in dispute at trial. 398 S.C. 197, 206-207; 727 S.E.2d 751, 756. As a result, the appellate court held that the trial court abused its discretion by admitting the photos over the objection of the defense based on Rule 403 of the South Carolina Rules of Evidence. 398 S.C. 197, 209; 727 S.E.2d 751, 757-758. The appellate court reiterated that "photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are not necessary to substantiate material facts," and noted that in regards to the issues in dispute at trial, the photos were not "necessary." 398 S.C. 197, 206; 727 S.E.2d 751, 756 (*citing State v. Torres*, 390 S.C. 618; 703 S.E.2d 226 (2010)).

The South Carolina Supreme Court ultimately overturned the result reached by the Court of Appeals, as a majority found the trial judge's mistake to be harmless error. *State v. Collins*, 409 S.C. 524; 763 S.E.2d 22 (2014). However, a majority of the Court was in agreement that the photos should have been excluded at trial, pursuant to SCRE Rule 403.

Id.

During the pre-trial conference, defense counsel objected to the publication of the in-car video of Sergeant Lee Wright for multiple reasons, including objection because the video portrayed the actions of Mr. Wright that were taken at least partly in response to erroneous information. *Transcr. pg. 47, para. 13-17.* Defense counsel renewed these objections at trial. *Transcr. pg. 86, para. 1-4.*

At trial, defense counsel specifically objected to the publication of the in-car video because it contained multiple conversations between various parties that would serve little purpose other than to arouse the sympathy and emotion of the jury. The video contained conversations of various parties with two of the individuals who were shot by the Appellant and who incurred injuries, which would add little to the case, as the Appellant admitted that he shot these individuals. The evidence of the crime scene with an ambulance and people talking and images of Zachary Cleveland being loaded into the ambulance were of little probative value in regards to a determination as to whether the Appellant acted in self-defense. In regards to the parties whose injuries led to the indictments, both parties testified at trial and both presented other evidence in regards to the extent of their injuries. Sergeant Lee Wright had already testified to the chaotic nature of the crime scene at the time he arrived, and his testimony was undisputed in this regard. Like the photographs in *State v. Collins* that were held to have little probative value, the video published to the jury in the case at issue served little or no effect other than to inflame the jury.

2. The trial court erred in admitting the 911 call made by a witness, because the probative value of the content of the 911 call was substantially outweighed by the danger of unfair prejudice as the content was cumulative and provocative, and the content was not probative as to whether the Appellant acted in self-defense.

The content of a 911 call made by Amanda Charles was also admitted as evidence over the defense counsel's rule 403 objection. At trial, the state argued that the introduction of the 911 call was probative because it contains a conversation with Bobby Trader where he indicates he was shot and contains live audio recordings of the gun shots referenced throughout the case. The trial court admitted the 911 call over the objection of defense counsel without engaging in a balancing test to discern whether the probative value of the evidence contained in the 911 call was substantially outweighed by the danger of unfair prejudice.

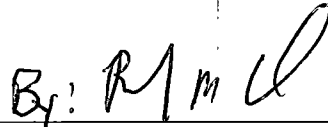
The contents of the 911 call had little probative value. The caller told the 911 operator that she "didn't really know how all this happened," *transcr. pg. 335, para. 20-22*, so the call was not probative as to the Appellant's self-defense claim. The Appellant admitted he shot Bobby Trader and Zachary Cleveland, so the live audio recordings of the gun shots would have little or no value to the trier of fact, meaning the only substantial effect of the introduction of the evidence of the gun shots would be an emotional appeal to the jury, and to inflame the jury and excite the jury to take action. In addition, the jury had already received photographic evidence and already heard substantial testimony from the state's witnesses regarding the substantial blood loss, including circumstantial evidence of the gun shots in the form of various photos of the bullet casings and gun shells, in addition to the Appellant's admission as to the gun shots.

CONCLUSION

The trial court erred in admitting the in-car video of Sergeant Lee Wright. The Appellant was unconscious at the time Sergeant Wright arrived at the scene, and the video did not contain any new evidence that was probative as to whether the Appellant acted in self-defense. The Appellant's actions that gave rise to the indictments were already completed prior to the arrival of Sergeant Wright, and the video contained substantial footage of a chaotic crime scene intended to inflame and incite the jury. The trial court abused its discretion in admitting the in-car video of Sergeant Lee Wright, as the probative value of the video content was substantially outweighed by the danger of unfair prejudice. Therefore, the Appellant's criminal convictions should be reversed.

In addition, the trial court erred in admitting the 911 call made by a witness. The 911 call contained inflammatory material in the background, including gun shots and a conversation with one of the individuals who sustained injuries. The contents of the 911 call are not probative as to any issue that was in dispute. The contents of the 911 call were probative only as to the occurrence of the gun shots and the injuries sustained by Bobby Trader, and the Appellant admitted that he shot and injured Bobby Trader. Substantially evidence had already been admitted as to the gun shots and the bullet casings and empty shells. The trial court abused its discretion in admitting the 911 call made by the witness Amanda Charles, as the probate value of the contents of the 911 call was substantially outweighed by the danger of unfair prejudice. Therefore, the Appellant's criminal convictions should be reversed.

Respectfully submitted,

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This 1st day of July, 2016.