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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Richland County

Honorable D. Craig Brown, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

Demetrius Derrick Henderson,

APPELLANT

APPELLATE CASE NO. 2015-001075

ANDERS BRIEF OF APPELLANT

Kathrine H. Hudgins
Appellate Defender

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in allowing the State to introduce evidence and testimony derived from a GPS ankle monitor Appellant was wearing on the evening in question when the evidence was confusing and any possible probative value was outweighed by the prejudicial effect?

STATEMENT OF THE CASE

In October of 2014, the Richland County Grand Jury indicted Appellant Henderson for grand larceny, burglary first degree, trafficking in cocaine, 10-28 grams and possession with intent to distribute marijuana, indictments #2014-GS-40 -6872, 73, 74, 77. On May 6, 2015, Henderson proceeded to jury trial before the Honorable D. Craig Brown. Megan Eigenbrot and Constantine Pournaras represented Henderson at trial. Britton All and Joseph Shenkar prosecuted the case. On May 8, 2015, the jury returned verdicts of guilty as charged. Judge Brown sentenced Henderson to fifteen (15) years for burglary first degree, three (3) years consecutive for grand larceny, ten (10) years consecutive for trafficking in cocaine and one year consecutive for possession with intent to distribute marijuana, resulting in an aggregate sentence of twenty nine (29) years. A timely notice of intent to appeal was served on May 18, 2015. This appeal follows.

ARGUMENT

The trial judge erred in allowing the State to introduce evidence and testimony derived from a GPS ankle monitor Appellant was wearing on the evening in question when the evidence was confusing and any possible probative value was outweighed by the prejudicial effect.

On December 18, 2013, at 6:24 PM officers with the Columbia Police Department responded to the Reserve at Riverwalk Apartment complex after receiving a call about shots being fired. (R. pp. 121-123). When the officers arrived at the apartment complex they found Appellant lying face down with multiple gunshot wounds. (R. p. 126, line 21 – p. 127, lines 1-21). Appellant was taken to the hospital for treatment and the police began to investigate. Police learned that the boyfriend of the woman who lived in apartment #51-10 was seen talking with another individual in a Dodge Intrepid just after the shots were fired. (R. pp. 99-100; p. 388, line 19 – p. 389, lines 1-18). The woman, April Jenkins, pulled into the apartment complex as police were on the scene still investigating. (R. p. 389, lines 10-18). Her boyfriend, Costell Johnson, contacted the police shortly after the shooting and later gave a statement to police. (R. p. 389, line 19 – p. 390, lines 1-5). Johnson died prior to the trial. (R. p. 204, lines 15-21). The police learned that the individual seen driving the Dodge Intrepid was Johnson's cousin, Travis Brimfield. (R. p. 415, lines 12-16).

Brimfield admitted shooting Appellant with an assault rifle and fleeing the scene. (R. pp. 194-197). According to Brimfield, when he and Johnson returned to Jenkins' apartment they had difficulty entering because there was a chair pushed up against the door. (R. p. 190, line 20 –p. 191, lines 1-7). Once inside the apartment the men realized that the apartment had been burglarized. (R. p. 175, lines 25 – p. 176, lines 1-24). Brimfield testified that he went to the room in the apartment where he sometimes stayed, grabbed his assault rifle and went outside. (R. p. 176, line 25 – p. 177, lines 1-14). Once outside Brimfield saw Appellant and asked him

three times, "Have you been in my shit?" (R. p. 177, lines 16-24). According to Brimfield, when asked a third time Appellant answered, "Yeah" and started moving backward and reaching. (R. p. 179, lines 3-18). Brimfield testified, "So that's when – when it came in my head I was terrified and I was scared. So I just started shooting because either I was going to get shot or he was going to get shot." (R. p. 179, lines 19-22). Appellant was unarmed.

The police found Appellant's car near the scene. (R. p. 401, line 19 – p. 402, lines 1-17). Inside the car the police found televisions and other items belonging to Jenkins. (R. pp. 402-403). The police also found marijuana and a digital scale in the car. (R. p. 239, lines 17-21). A bag of cocaine and some television remotes were found on Appellant at the scene. (R. p. 416, line 14 – p. 417, lines 1-7).

At the time of the incident, Appellant was on probation and was wearing a GPS ankle monitor maintained by the South Carolina Department of Probation, Parole and Pardon Services [PPP]. (R. p. 29, lines 15-18). Appellant moved to prevent the State from referencing the fact that Appellant was on probation and prevent the State from using any information from the ankle monitor. (R. pp. 29-32). Appellant argued that the evidence constituted impermissible character evidence and was not needed to establish that Appellant was at the scene as Appellant was found at the scene, suffering from multiple gunshot wounds. Appellant argued that any probative value of the GPS evidence was outweighed by its prejudicial effect. (R. p. 32, lines 20-22). The State argued that the evidence showed that Appellant was "scoping" the apartment prior to the burglary. (R. p. 33, lines 13-16). The State agreed not to use certain terms that would indicate that Appellant was on probation but would refer to GPS data generally. (R. pp. 34-35). The trial judge withheld a formal ruling.

One of the responding officers testified before the jury that he remembered that Appellant was wearing an ankle bracelet. (R. p. 129, lines 18-20). Appellant moved for a mistrial which the judge denied. (R. p. 131, lines 3-17). The judge later admitted the GPS evidence stating, "I'm going to allow it in. Now, I think it's highly, highly probative, okay? Now defense counsel can stipulate that it's applicable to him or they got to have some leeway to make that connection." (R. p. 299, lines 11-15). The judge did not state specifically how the evidence was probative.

Prior to admission of the GPS testimony before the jury, the State proffered the testimony of Agent Mitchell Tucker with PPP. (R. pp. 301-317). After the proffer Appellant again objected arguing that the testimony was irrelevant and confusing. (R. p. 319, line 2 – p. 320, lines 1-17). The judge stated, "I think the probative value far outweighs any prejudicial effect to your client. It is highly probative in this case."(R. p. 321, lines 1-3). Again, the judge did not state specifically how the evidence was probative. Tucker, without objection, was qualified as an expert in GPS data and interpretation. (R. p. 327, lines 9-14). When Tucker testified before the jury Appellant objected to the admission of State's Exhibits #56 - #61, data and graphs from the ankle monitor worn by Appellant at the time of the incident. (R. p. 329, line 22 – p. 330, lines 1-14). The judge again overruled the objection. (R. p. 330, lines 3-5). At the close of the State's case Appellant again objected to the GPS testimony and evidence. (R. p. 479, lines 8-12). The judge again overruled the objection. (R. p. 489, lines 16-17). The trial judge erred in admitting the GPS testimony and evidence. The testimony and evidence was confusing and any possible probative value was outweighed by the prejudicial effect.

Rule 403, SCRE, provides that, "Although 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." "A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." State v. Adams, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct.App.2003). Exceptional circumstances in the present case warrant this Court reversing the decision of the trial judge in regard to the admission of the GPS testimony and evidence.

As to any possible probative value, the GPS testimony and evidence was confusing and failed to establish that Appellant was scoping the apartment, as argued by the State. The State did not need the evidence to establish that Appellant was at the scene because police found Appellant at the scene suffering from multiple gunshot wounds. The judge did not specifically state how the GPS testimony and evidence was probative.

As to prejudicial effect, although the GPS testimony was general without reference to probation, the inference from the testimony was that Appellant was either on bond for a serious offense, on probation for a serious offense or required to register as a sex offender and wear a GPS ankle monitor. (R. p. 30, lines 8-19). This is especially true in light of the officer's improper testimony that Appellant was wearing an ankle bracelet. (R. p. 129, lines 18-20). When juxtaposing the prejudicial effect against the probative value, the determination must be based on the entire record and will turn on the facts of each case. State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876, (2007) (citing State v. Bell, 302 S.C. 18, 30, 393 S.E.2d 364, 371 (1990)). While Appellant was required to wear the ankle monitor as a condition of probation, this information was properly excluded and any inference in regard to Appellant's probationary status should also have been excluded. The inferences from the GPS testimony and evidence created unfair prejudice to Appellant, far out-weighing any possible probative value. "Unfair

prejudice means an undue tendency to suggest a decision on an improper basis." State v. Gilchrist, 329 S.C. 621, 627, 496 S.E.2d 424, 427 (Ct.App.1998). The trial judge erred in admitting the confusing and unfairly prejudicial GPS testimony and evidence.

CONCLUSION

Based on the above argument this Court should reverse Appellant conviction and sentence and remand the case for a new trial.

Respectfully submitted,

Susan B. Hackett for
Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of July, 2016.

STATE OF SOUTH CAROLINA
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THE STATE,

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DEMETRIUS HENDERSON,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Demetrius Henderson states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. She has reviewed the record of appellant's trial before Judge D. Craig Brown, which was held on May 6-8, 2015 (Trial), and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Demetrius Henderson.

Respectfully submitted,

Susan B Hackett for
Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR APPELLANT

This 5th day of July, 2016

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DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True-billed indictments and sentencing sheets;
(2) Trial transcript;
(3) State's Exhibit #56 – 5 page GPS report;
(4) State's Exhibits #57-61 – GPS maps – To be transported to the Court.

I certify that this designation contains no matter which is irrelevant to this appeal.

Susan B Hackett for

Kathrine H. Hudgins
Appellate Defender

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(803) 734-1343

This 5th day of July, 2016.

ATTORNEY FOR APPELLANT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant 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."

Susan B. Hackett for

Kathrine H. Hudgins
Appellate Defender

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This 5th day of July, 2016.