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STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of General Sessions

The Honorable J. Mark Hayes, II, Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2015-000305

State of South Carolina, ...Respondent,

v.

Justin Dru Faile, ...Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. The trial judge did not err in admitting Sergeant Wright's in-car video into evidence.

2. The trial judge did not err in admitting the recording of the 911 call into evidence.

STATEMENT OF THE CASE

Appellant was indicted at the July 2014 term of the York County Grand Jury for pointing and presenting a firearm (2014-GS-46-2038), three counts of attempted murder (2014-GS-46-2039, -2040, -2041), and possession of a weapon during commission of a violent crime (2014-GS-46-2042). Melissa Inzerillo, Esquire represented Appellant.

The State brought the case to trial on February 9, 2015. Prior to the commencement of trial, the assistant solicitor noted the State had elected to proceed solely upon indictments 2014-GS-46-2039 and 2014-GS-46-2041. (R. pp. 6-7; pp. 439-42). The assistant solicitor also noted the State had elected to proceed under the lesser-included offense of assault and battery of a high and aggravated nature on indictment 2014-GS-46-2039. (R. p. 7).

The jury found Appellant guilty of two (2) counts of assault and battery of a high and aggravated nature. (R. pp. 427-28). The Honorable J. Mark Hayes, II levied concurrent sentences of twenty (20) years imprisonment, suspended upon the service of nine (9) years imprisonment and five (5) year probation on each count. (R. p. 436; pp. 443-44).

STATEMENT OF FACTS

Pre-Trial

Prior to trial, trial counsel noted she had discussions with the assistant solicitor concerning potential redactions. Trial counsel said she told the assistant solicitor she would object to any portion of the police officer's in-car recording that contained "any dispatch traffic as they're driving there" because it contained "erroneous information about the scene." (R. p. 10). Trial counsel also noted "there are parts of that tape where another officer who I do not see on the state's witness list comes and gives a recitation of a statement that was given to him by an eye witness that I believe he mischaracterizes." (R. p. 11). Trial counsel and the assistant solicitor confirmed they had discussed these redactions. (R. pp. 11-13).

Trial counsel also objected "as to what's included in that section is because of the nature of his body mic you pick up the audio of Mr. Trader on the ground before EMS arrives and Mr. Trader is making several statements." (R. p. 13). Trial counsel argued this was hearsay. (R. p. 13). The assistant solicitor noted they intended to call this witness and the trial judge stated he would, therefore, likely allow it. (R. pp. 13-14). Though trial counsel also argued the statements were of an "emotional nature" and "would be a[n] emotional connection that the jury could have," the trial judge stated he would be inclined to allow it. (R. pp. 14-15).

Trial counsel also noted the assistant solicitor had been very helpful in reviewing and assisting in the redaction of the 911 audiotape in this case. (R. pp. 16-17). Trial counsel, however, objected to the admission of the 911 tape "along the same lines of an objection to the in-car [recording]." (R. p. 23).

Trial

State's Case

A birthday party was held at a bar in Rock Hill, South Carolina and it lasted from the evening of December 13, 2013 until the early morning of December 14, 2013. At some point, Logan Brooks was involved in a fight. (R. pp. 69-70; p.72; p. 262). The owner of the bar asked Brooks to leave. (R. pp. 159-60; pp. 171-72). Zachary Cleveland left the party around 2:00 a.m. and heard someone "hollerin' [his] name asking [him] to please come get [Brooks] he's startin to try to start a fight with people." (R. p. 71). Cleveland pushed Brooks towards his vehicle while Samuel Fitcher walked behind them and yelled to Brooks "why don't you fight somebody your own size." (R. p. 71; pp. 72-73; pp. 172-74; pp. 178-80). Cleveland and Brooks got into the vehicle and Fitcher punched Brooks though the passenger window. (R. pp. 71-73; pp. 173-74; pp. 217-19; p. 232; p. 234).

Cleveland exited the vehicle after he put it in park. As he came around the vehicle, Appellant "was standing there with a pistol in [his] face." (R. pp. 71-73; p. 274; p. 220; p. 234). Cleveland put his hands in the air and then Bobby Trader hit Appellant and "they scuffled around on the ground." (R. p. 75; p. 220). Cleveland heard several gunshots and jumped on top of the two men in an attempt to get Appellant's gun.[1] (R. p. 75). Appellant fell to the ground, tucked the gun under his stomach, and fired several more times. (R. p. 75; p. 77; pp. 220-21; pp. 237-38). Cleveland and Trader were both shot several times.[2] (R. pp. 75-78; pp. 80-81; p. 221). Several people began to punch and kick Appellant in order to divest him of the gun. During the

[1] Several witnesses heard gunshots but did not see the shooting. (R. p. 159; p. 175; p. 263; p. 281).
[2] Amanda Charles called 911 after Trader was shot. (R. pp. 290-91; p. 293).

scuffle, several more shots were fired. (R. pp. 119-220; pp. 222-23; p. 239; pp. 248-52; pp. 263-66; p. 269; pp. 271-73; pp. 279-80; p. 282). Brooks eventually took Appellant's gun and placed it on the ground. (R. pp. 77-78; pp. 99-100; pp. 123-24; p. 224; pp. 266-67). A surveillance videotape of the shooting was authenticated by Cleveland, admitted into evidence, and published to the jury. (R. pp. 92-94).

Sergeant Lee Wright with the York County Sheriff's Office responded to the crime scene in the early morning hours of December 14, 2013. (R. p. 35). Sergeant Wright stated "[t]he call came out as shots fired, person shot by some type of firearm" and he was the first officer on the scene. (R. p. 35). Sergeant Wright encountered a large group of people and one person lying atop another on the ground. (R. p. 35). When advised one of these men was the shooter, he handcuffed this individual – who was Appellant. (R. p. 35). Appellant was unconscious and Sergeant Wright noted he "[a]ppeared to be badly beaten." (R. p. 36; p. 55; p. 61). After Deputy Chad Davis assumed control of Appellant, Sergeant Wright went to the two injured persons – one of whom had been shot in the leg and foot and the other had multiple gunshot wounds. (R. pp. 36-37). Twelve .40 caliber shell casings were eventually recovered from the crime scene. (R. pp. 194-95; p. 203).

Doctor Heidi Weilback testified as an expert in trauma surgery. (R. p. 133). Dr. Weilback treated Trader, who was admitted with nine gunshot injuries. (R. pp. 134-38). Dr. Weilback testified several of these injuries were life threatening but Trader did not have surgery. (R. pp. 139-44).

Doctor Alex Espinol testified as an expert in trauma surgery. (R. pp. 149-50). Dr.

Espinol treated Cleveland, who was admitted with gunshot wounds in his foot and leg.[3] (R. pp. 150-51). Dr. Espinol testified the injury to the leg was potentially life threating but that Cleveland did not have surgery. (R. p. 152; p. 154).

Appellant's Case

Appellant confirmed he was at the party on the night in question. (R. pp. 299-300). Appellant was drinking and playing pool "and everybody had a real good time." (R. pp. 300-01; p. 330). Around 1:45 a.m., Appellant heard a commotion outside and saw someone lying on the ground but did not see the fight itself. (R. pp. 301-02). Appellant determined no one who was with him was involved in the fight, so he told his girlfriend to settle the bar tab and get ready to leave. (R. pp. 302-03). Appellant walked to the vehicle to ask Brooks about the fight and Fitcher walked over at the same time. (R. pp. 303-05; pp. 327-28). Appellant saw Fitcher reach into the truck and hit Brooks. (R. pp. 304-06; p. 329; p. 335). Appellant said Cleveland put the vehicle into park, got out, and came quickly towards him. (R. p. 307). Appellant noted Cleveland was taller and heavier than him. (R. pp. 307-08). Appellant had a gun on his person when he approached the vehicle but said he had no intention of pulling it out. (R. p. 306). Appellant pulled out his weapon because he "did not want this to escalate to a fight" and he "pulled it to defuse the situation." (R. pp. 308-09; pp. 326-27; p. 329). Appellant walked backwards as Cleveland continued to approach him. (R. p. 309). Appellant did not remember what happened right after this because he lost consciousness but he did remember lying on the ground, being hit and kicked, and moving in and out of consciousness. (R. pp. 310-11; p. 334). Appellant stated he did not intentionally shoot the gun, did not remember shooting anyone, and

[3] Dr. Espinol testified he was also intoxicated. (R. p. 155).

only had a memory of shooting bullets into the ground because "I didn't want to go unconscious and them use the gun against me." (R. pp. 311-12).

Deputy Chad Davis testified he responded to the scene on the night in question and Appellant was unconscious on the ground when he arrived. (R. pp. 342-43; p. 345). Deputy Davis stated Appellant appeared to have been beaten and did not regain consciousness at the scene or the hospital. (R. pp. 345-47).

ARGUMENT

I. The trial judge did not err in admitting Sergeant Wright's in-car video recording into evidence.

Appellant argues the trial judge "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." (Brief of Appellant, p. 9). This argument is without merit.

Prior to the introduction of the recording from Sergeant Wright's in-car camera, the jury was excused. (R. p. 41). Trial counsel stated she reviewed the redacted video and had several objections. (R. p. 42). Trial counsel renewed all pre-trial objections to Sergeant Wright's in-car video recording. (R. pp. 42-43). Trial counsel objected to comments made by other people that can be heard on the recording. (R. p. 43). Trial counsel argued this was hearsay and "intended to arouse the sympathy and emotion of the jury." (R. p. 43). Trial counsel also noted that, on the recording, Sergeant Wright "is narrating to other people who come onto the scene" and that this narration should be redacted. (R. pp. 43-44). Trial counsel also objected to Sergeant Wright's

comment on the video about blood and argued "that would be his personal observation as to what he considered blood" and it should be redacted. (R. pp. 43-44). The trial judge stated he would allow the video to be admitted into evidence, noting the witnesses on the video would be subjected to cross-examination. (R. p. 45). The in-car video recording was admitted into evidence – subject to trial counsel's previous objection – and published to the jury. (R. pp. 46-48).

"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." Rule 403, SCRE. In exercising its discretion on a Rule 403 objection, a trial court must balance the unfair prejudice of the challenged evidence against the probative value. See State v. Dial, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013) (citations omitted). However, "[a] trial court has particularly wide discretion in ruling on Rule 403 objections." State v. Lee, 399 S.C. 521, 527, 732 S.E.2d 225, 228 (Ct. App. 2012) (citing State v. Adams, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003)). "A trial judge's decision regarding the comparative probative value and prejudicial effect of relevant evidence should be reversed only in exceptional circumstances." State v. Dial, 405 S.C. at 260, 746 S.E.2d at 502 (citation omitted); see also State v. Stephens, 398 S.C. 314, 320, 728 S.E.2d 68, 71 (Ct. App. 2012) ("A trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence.") (citation omitted).

"Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." State v. Dennis, 402 S.C. 627, 636, 742 S.E.2d 21, 26 (Ct. App. 2013) (quoting State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998)). "Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one." State v. Cheeseboro, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001) (citations omitted). The determination of unfair prejudice must be based on the entire record and the result will generally turn on the facts of the case. State v. Wilson, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001) (citation omitted).

The trial judge did not err in admitting Sergeant Wright's in-car video recording into evidence because its probative value outweighed the danger of unfair prejudice. As is clear from his comments at both the pre-trial hearing and during the trial itself, the trial judge balanced the probative value of the recording versus the potential for prejudice. The in-car video recording is the best evidence of the appearance of the crime scene (and Appellant's location) when Sergeant Wright arrived. As such, the probative value of the in-car video recording is clear. Further, the recording's probative value outweighed the danger of unfair prejudice. The recording was redacted (to the extent possible) prior to its admission. The recording was admitted during Sergeant Wright's testimony and he was, therefore, subject to cross-examination about the recording. Trial counsel was able to, for example, have Sergeant Wright clarify that the recording included conversations between individuals at the scene that were not directed at the officers. (R. p. 54). The trial judge properly balanced the probative value of the in-car video recording versus the danger of unfair prejudice and did not abuse his discretion in admitting this

recording into evidence at trial. See State v. Dial, 405 S.C. at 260, 746 S.E.2d at 502.

Regardless, even if the trial judge erred by admitting the in-car video recording into evidence, any resulting error would be harmless. See State v. Stokes, 339 S.C. 154, 159, 528 S.E.2d 430, 432 (Ct. App. 2000) ("Even if the evidence is not relevant, its admission may constitute harmless error if the irrelevant evidence did not affect the outcome of the trial.") (citation omitted). The State presented overwhelming evidence of Appellant's guilt at trial. Numerous witnesses (including Appellant) testified Appellant pointed a gun at Cleveland without provocation. Numerous witnesses testified (including Appellant) that Appellant fired this gun several times in a crowded parking lot. Even assuming arguendo that Sergeant Wright's in-car video recording should not have been admitted into evidence at trial, there was ample evidence presented to the jury to support the verdicts for assault and battery of a high and aggravated nature. See State v. Livingston, 282 S.C. 1, 6, 317 S.E.2d 129, 132 (1984) ("[W]here guilt is conclusively proven by competent evidence and no rational conclusion can be reached other than the accused is guilty, a conviction will not be set aside because of insubstantial errors not affecting the result.") (citation omitted).

Accordingly, the trial judge did not err in admitting Sergeant Wright's in-car video recording into evidence and this Court must affirm.

II. The trial judge did not err in admitting the recording of the 911 call into evidence.

Appellant argues the trial judge "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." (Brief of Appellant, p. 12). This argument is without merit.

Prior to Amanda Charles' testimony, trial counsel objected to the admission of the recording of her 911 call for two reasons: (1) the recording was being introduced through Charles and not someone in the emergency management system and (2) there are numerous voices in the background who may not have testified at trial. (R. pp. 285-86). The trial judge noted he had listened to the 911 tape and it was the best evidence of what Charles said during the call. (R. p. 287). The trial judge stated Charles would not be allowed to explain any background noises on the tape. (R. p. 287). The trial judge also stated he would not allow Charles to testify about what was on the tape, as it would be duplicative. (R. pp. 287-88). The 911 audio recording was admitted into evidence during Charles' testimony – subject to trial counsel's previous objection – and published to the jury. (R. pp. 291-92).

The trial judge did not err in admitting the recording of the 911 call into evidence because its probative value outweighed the danger of unfair prejudice. Similar to the admission of Sergeant Wright's in-car video recording, it is clear the trial judge balanced the probative value of the 911 call recording versus the potential for prejudice. Charles called 911 after Appellant shot Trader. (R. p. 223; p. 264; p. 290; pp. 292-93). As such, the recording of Charles' 911 call was highly probative because it was the best evidence of what she witnessed during Trader's shooting and the subsequent fight between Appellant and the assembled group. Further, the probative value of the recording of the 911 call was not substantially outweighed by the danger of unfair prejudice. The trial judge specifically prohibited any testimony from Charles about either the background noises on the audiotape or what was on the recording itself. (R. pp. 287-

88). The trial judge avoided potential prejudice by not allowing Charles to provide duplicative testimony. The trial judge properly balanced the probative value of the recording of the 911 call versus the danger of unfair prejudice and did not abuse his discretion in admitting this recording into evidence at trial. See State v. Dial, 405 S.C. at 260, 746 S.E.2d at 502. Regardless – as more fully described supra – even if the trial judge erred by admitting the recording of the 911 call into evidence, any resulting error would be harmless. See State v. Stokes, 339 S.C. at 159, 528 S.E.2d at 432; State v. Livingston, 282 S.C. at 6, 317 S.E.2d at 132.

Accordingly, the trial judge did not err in admitting the recording of the 911 call into evidence and this Court must affirm.

CONCLUSION

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

Respectfully submitted,

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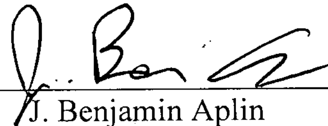
By: 
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CERTIFCATE OF COUNSEL

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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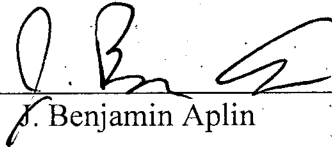
BY: 
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