

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Thomas A. Russo, Circuit Court Judge

APPELLATE CASE NO. 2014-002206

THE STATE,

RESPONDENT,

V.

KEITH CHRISTOPHER OSBORNE,

APPELLANT

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES 2

STATEMENT OF ISSUES ON APPEAL 3

STATEMENT OF THE CASE 4

ARGUMENT 11

CONCLUSION 19

TABLE OF AUTHORITIES

Benton v. Pellum, 232 S.C. 26, 100 S.E.2d, 534, 537 (1957)

Chaffee v. State, 294 S.C. 88, 362 S.E.2d 875 (1987)

Connelly v. Wometco Enterprises, Inc., 314 S.C. 188, 191, 442 S.E.2d 204, 206 (Ct.App.1994)

Ex parte Dep't of Health & Env'tl. Control, 350 S.C. 243, 249–50, 565 S.E.2d 293, 297 (2002)

State v. Davis, 371 S.C. 170, 638 S.E.2d 170 (2006)

State v. McFarlane, 279 S.C. 327, 330, 306 S.E.2d 611, 613 (1983)

State v. Sarvis, 317 S.C. 102, 107, 450 S.E.2d 606, 609 (Ct.App.1994);

State v. Townsend, 321 S.C. 55, 59, 467 S.E.2d 138, 141 (Ct. App. 1996)

Stevens v. Allen, 336 S.C. 439, 520 S.E.2d 625 (1999)

Twelfth RMA Partners, L.P. v. National Safe Corp., 335 S.C. 635, 518 S.E.2d 44 (Ct. App. 1999)

South Carolina Rules of Evidence:

Rule 801(c)

Rule 802, SCRE

Rule 803(6)

South Carolina Code of Laws:

S.C. Code Ann. § 19-5-510

STATEMENT OF ISSUES ON APPEAL

I.

The trial court committed reversible error in allowing the State to admit complainant's, Helen Lang, credit card statement into evidence under Rule 803(6), SCRE, by ruling that Lang was a qualified witness despite Lang having no knowledge of how the credit card statement was generated or issued.

II.

The trial court committed reversible error in allowing the State to admit a photograph, taken by South Congaree Chief of Police Justin Sheumpert, of video surveillance footage from a McDonalds' restaurant pursuant to Rule 803(6), SCRE, where the State failed to lay a proper foundation, including an adequate chain of custody, and failed to call a witness with knowledge of how the video surveillance footage was generated and stored in the course of the restaurant's regular operation.

STATEMENT OF THE CASE

On March 6, 2013, the Lexington County Grand Jury indicted Appellant Keith Osborne for one count of first degree assault and battery and one count of strong armed robbery. (R.pp. 222-227).

On October 8-9, 2014, Appellant proceeded to trial before the Honorable Thomas A. Russo and a jury. David Mauldin represented Appellant, and Assistant Solicitors Kate W. Usry and Robert McNair represented the State.

The jury found Appellant guilty as charged. (R. p. 210, l. 24 - 211, l. 17). The trial court sentenced Appellant to concurrent terms of fifteen years imprisonment for strong armed robbery and ten years imprisonment for first degree assault and battery. (R. 219, l. 9 - 220, l. 6)

STATEMENT OF FACTS

On the afternoon of June 12, 2012, Helen Lang, 74, was walking through the parking lot of the South Congaree Food Lion in Lexington County. (R. p. 64, l. 3-20) Lang had just returned her shopping cart when a white pick-up truck stopped in front of her. (R. p. 67, l. 9 - 68, l. 12)

Inside of the truck were two white males with short brown hair. *Id.* The passenger asked Lang for directions. (R. p. 65, l. 8 - 66, l. 25) As Lang gave directions, the passenger suddenly grabbed her purse. *Id.* The truck then accelerated out of the parking lot with Lang still holding onto her purse. Eventually, Lang let go of her purse and fell to the ground. *Id.*

She suffered a fractured pelvis, a broken finger, and bruising. (R. p. 68, ll. 13-23) Lang specifically recalled that the passenger had a distinctive tattoo on his arm, "he had painted on his arm flames like." (R. p. 67, ll. 19-23) South Congaree Police Chief Justin Sheumpert, then a lieutenant, responded to the Food Lion and issued a "be on the lookout" for the white pick-up truck and two white males. (R. p. 92, l. 5 - 95, l. 9)

Several days after the incident, Lang received a credit card statement covering May 19 through June 19 with two unfamiliar charges on it. *Id.* On June 12, her card had been charged \$33.95 at a McDonalds on Elmwood Drive in Columbia and a combined \$165.25 at a Marathon gas station adjacent to the McDonalds and also on Elmwood. (R. p. 77, l. 7)

She turned the bill over to Sheumpert. (R. p. 94, ll. 11-25) At some point during his investigation, Sheumpert reviewed surveillance footage from both businesses and identified a white pick-up truck matching the description of the one used in the robbery. (R. p. 96, l. 15 - 104, l. 21) Sheumpert was unsure of the exact date of his visit. However, neither the McDonalds nor Marathon store managers were able to create a copy of their video footage. *Id.*

Sheumpert then used his cell phone to take still photographs of the McDonalds' footage and a video of the surveillance footage from Marathon. *Id.* (R. p. 99, l. 2 - 101, l. 20); (State's Exhibits R. p. 228-232). The Marathon video contained a date stamp of June 12, 2012, but the McDonalds' photograph was undated. *Id.*

Police recovered some of Lang's personal items, including credit cards and her purse, which had been discarded along Manor Drive in South Congaree. (R. p. 102, ll. 4-10) In October, 2012, Richland County deputies contacted Sheumpert and identified Appellant and Joshua Hilton as two individuals that matched the description of the suspects. (R. p. 104, l. 8- 106, l. 1)

Trial

Admission of Lang's Credit Card Bill

Lang testified regarding her credit card statement and the State sought to move the bill into evidence. (R. p. 74, ll. 5-17) Defense counsel objected to the admission of the credit card bill positing that Lang did not know how the bill was prepared and the State had not presented a records custodian or other qualified witness from the credit card company who could testify as to the bill's creation. *Id.*

Adopting the State's argument, the court ruled that the statement could be admitted as a business record under Rule 803(6), SCRE, and that Lang was a "qualified witness" because "it's within her knowledge of what happened with her property . . . It's her statement she can talk about it." (R. p. 46, l. 19-25; R. p. 74, l. 5 - 77, l. 4) Lang also made an in court identification of Appellant as the driver of the white pick-up truck. (R. p. 78, l. 24 - 79, l. 1).

Admission of Sheumpert's Photograph of McDonald's Surveillance Footage

Sheumpert testified about his investigation. He recalled his inability to secure a copy of the video surveillance from the McDonalds and the Marathon. (R. p. 99, l. 2 - 101, l. 20) The State then

attempted to enter into evidence the still photographs Sheumpert took of the McDonalds' surveillance footage. (R. p. 96, l 9 - 99, l. 11)

Defense counsel objected to the admission of the photograph arguing that it constituted inadmissible hearsay not fitting within any exception. *Id.* Notably, the State did not present a witness familiar with the operation of the surveillance equipment at or near the time the McDonalds' video footage was generated. The trial court overruled the objection. (R. p. 98, ll. 9-16)

Objection to Sheumpert's Video Footage of Marathon's Surveillance Footage

The State also attempted to introduce Sheumpert's cell phone video footage purporting to record the unavailable video surveillance footage of the Marathon gas station. (R. p. 96, l 9 - 101, l. 24) The State did not move the video into evidence during Sheumpert's testimony.

Rather, the State called the current store manager, Sheila Derrick, to testify. (R. p. 127, l. 19 - 128, l. 8) Derrick testified that video footage from her store's surveillance cameras is typically only kept for thirty to forty five days. *Id.* She also testified that she knew the store's cameras were working on June 12, 2012. *Id.*

Prior to the video being offered into evidence, Derrick admitted on cross-examination that she was not the manager on June 12, 2012 and that she did not access or show Sheumpert any footage from that day. (R. p. 128, l. 19 - 135, l. 8) Derrick also admitted that she had, in fact, never reviewed any of the footage Sheumpert claimed to have recorded. *Id.*

Defense counsel then objected to the admission of the video footage arguing that a proper foundation had not been laid. (R. p. 130, ll. 9-25) In a hearing outside of the presence of the jury, the State countered that Derrick was a qualified witness under the business records

exception because she was someone who was familiar with the process and could recognize the store. (R. p. 131, ll. 1-16)

The defense argued that Derrick was not a qualified witness because she was not working at the store on June 12, 2012, or when Sheumpert recorded the footage, thus, she was not present when the video footage was created. *Id.* At (R. p. 131, ll. 17-25). Ultimately the trial court sustained the objection as the State was unable to produce a witness familiar with the store's cameras and video recording system. (R. p. 134, l. 3 - 135, l. 8)

Joshua Hilton's Testimony

After being unable to enter the Sheumpert's cell phone video, the State called Joshua Hilton. (R. p. 143, l. 1 - 146, l. 25). Hilton claimed that he and Appellant went to the South Congaree Food Lion to look for possible robbery targets. *Id.* They selected Lang because she had a large purse and was putting groceries into a nice SUV. *Id.*

After stealing the purse, Hilton alleged that they attempted to use Lang's credit cards at a number of gas stations, but were unsuccessful until reaching the Elmwood Marathon. (R. p. 152, l. 20 - 153, l. 14) Hilton averred that Appellant purchased a tank of gas, cigarettes, and beer at the Marathon. (R. p. 154, l. 17-25)

The two then went to the adjoining McDonalds and purchased a large quantity of food which Hilton averred they handed out to nearby homeless people. (R. p. 153, l. 19 - 154, l. 14) Hilton contended that the two also threw out Lang's purse, cell phone and other unwanted personal items on Manor road. (R. p. 151, ll. 3-25)

Less than a week after the incident, Hilton claimed that Appellant exchanged the white truck for a sedan and money because they had seen sketches of the suspects and feared police would be

looking for the truck. (R. p. 159, l. 6 - 160, l. 21) Hilton denied having been promised anything in exchange for his testimony. (R. p. 160, l. 22 - 161, l. 19)

On cross-examination, Hilton conceded that he was facing up to twenty-five years imprisonment for his pending strong armed robbery and first degree assault and battery charges. (R. p. 162, l. 1 - 163, l. 19) Hilton reluctantly admitted that he had written a series of letters to the solicitor offering to testify. *Id.* Hilton stated that he had lied in these letters when he first claimed that he had an alibi and that he made up an imaginary person, who also had the distinctive flame tattoo, in an effort to avoid admitting guilt. *Id.*

Hilton further admitted that he had only provided the solicitor with the story that would become his trial testimony on September 18, 2014, less than one month before trial. (R. p. 164, ll. 3-24) Hilton assured defense counsel that he decided to testify because, "I wanted to tell the truth. I just wanted . . . to do the right thing." *Id.*

Josephine Hilton's Testimony

The State's final witness was Josephine Hilton, Joshua's wife. (R. p. 169, ll. 6-22) Mrs. Hilton testified that her husband called her one day and asked her to do an internet search for the Food Lion robbery. *Id.* Ms. Hilton recalled telling him that the photographs of the suspect looked like him and Appellant. (R. p. 170, ll. 4-13).

On cross-examination, defense counsel asked Ms. Hilton about her two pending contraband charges arising out of her efforts to smuggle drugs to her incarcerated husband. (R. p. 170, l. 17 - 171, l. 5) Feeling that her character had been besmirched, Ms. Hilton angrily denied any connection between her testimony and her pending charges, "[t]hey have no bearing on this case because I was offered nothing." *Id.*

Appellant did not testify and the defense did not present any evidence. Following deliberations, the jurors found Appellant guilty of both charges. (T. p. 210, l. 8 -211, l. 17)

ARGUMENT

I.

The trial court committed reversible error in allowing the State to admit complainant's, Helen Lang, credit card statement into evidence under Rule 803(6), SCRE, by ruling that Lang was a qualified witness despite Lang having no knowledge of how the credit card statement was generated or issued.

“Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Rule 801(c), SCRE; *see State v. Townsend*, 321 S.C. 55, 59, 467 S.E.2d 138, 141 (Ct. App. 1996) (holding hearsay is defined as an out of court statement offered to prove the truth of the matter asserted). “Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute.” Rule 802, SCRE.

The business records exception to the rule against hearsay is found in the South Carolina Code at § 19-5-510¹ and in Rule 803(6) of the South Carolina Rules of Evidence. Both require substantially the same foundation prior to evidence being admitted as a business record:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, *a person with knowledge*, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, *all as shown by the testimony of the custodian or other qualified witness*, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness; provided, however, that subjective opinions and judgments found in business records are not admissible.

Rule 803(6), SCRE (*emphasis added*).

¹ “A record of an act, condition or event shall, insofar as relevant, *be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation*, and if it was made in the regular course of business, at or near the time of the act, condition or event and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.” S.C. Code Ann. § 19-5-510 (*emphasis added*).

Both exceptions require that the reliability of the evidence be established by a “custodian or other qualified witness” that is familiar with the how the purported business record is generated in the “regular course of business.”

A business record without evidence about how it is prepared or the source of its information does not meet the requirements in either S.C. Code Ann. § 19-5-510 or Rule 803(6), SCRE. *See State v. Sarvis*, 317 S.C. 102, 107, 450 S.E.2d 606, 609 (Ct.App.1994); *see also Connelly v. Wometco Enterprises, Inc.*, 314 S.C. 188, 191, 442 S.E.2d 204, 206 (Ct.App.1994) (employment file was properly excluded from evidence where the employer failed to offer the file through its custodian or another qualified witness); *State v. McFarlane*, 279 S.C. 327, 330, 306 S.E.2d 611, 613 (1983) (medical report inadmissible where no one could testify to the identity, mode of preparation, or whether report was made in the regular course of business or near the time of the accident).

Discussion

The State sought to enter into evidence a copy of Lang’s credit card statement in order to show that Appellant had stolen the credit card and used it at a Columbia area McDonalds and a Marathon gas station. (R. p. 74, l. 5 - 77, l. 14) The State reasoned that the bill was admissible under the business records exception to hearsay and that Lang was a qualified witness under the rule because “it’s within her knowledge what happened with her property. . . It’s her statement she received in the mail, she can talk about it.” (R. p. 46, ll. 19-25)

The trial court agreed and, over defense counsel’s renewed objection, ruled that the credit card statement was admissible. (R. p. 73, l. 16 - 77, l. 7) This was in error as there was no evidence that Lang had knowledge of how the credit card statement was created in the course of the credit

card company's normal course of business. Lang testified that she merely received the credit card statements in the mail. *Id.*

Nor did the prosecution present any evidence that Lang was conveying information imparted to her by a person "with knowledge" of how the credit card statement was generated. *Twelfth RMA Partners, L.P. v. National Safe Corp.*, 335 S.C. 635, 518 S.E.2d 44 (Ct. App. 1999) (employee maintained business records at issue in the regular course of her employment; thus she was a "qualified witness" despite being not being the custodian near the time of the documents' creation).

The State's argument in favor of admissibility erroneously focused on Lang's ownership of the credit card. (R. p. 46, ll. 19-25) In laying the foundation for the admissibility of her credit card statement under the business records exception, the State needed to present a witness with knowledge of how the credit card company generated the statement. *Stevens v. Allen*, 336 S.C. 439, 520 S.E.2d 625 (1999) (business records exception to hearsay rule requires a proper foundation be laid for admittance of evidence, including a chain of custody).

As Lang had no knowledge as to how the credit card statement was generated; the trial court erred reversibly when ruling that she was a qualified witness under Rule 803(6), SCRE, and S.C. Code Ann. § 19-5-510. (R. p. 46, ll. 19-25; R. p. 75, l. 3 - 77, l. 7)

II.

The trial court committed reversible error in allowing the State to admit a photograph, taken by South Congaree Chief of Police Justin Sheumpert, of video surveillance footage from a McDonalds' restaurant pursuant to Rule 803(6), SCRE, where the State failed to lay a proper foundation, including an adequate chain of custody, and failed to call a witness with knowledge of how the video surveillance footage was generated and stored in the course of the restaurant's regular operation.

Relevant Facts

Sheumpert testified that sometime after he received a copy of Lang's credit card statement, he visited both the McDonalds' and Marathon gas station identified in the statement. (R. p. 94, l. 19 - 101, l. 20) Sheumpert further testified that he spoke with the then-managers at both locations and that he inspected each business's video surveillance equipment. *Id.*

He recalled that neither business's managers were able to produce a copy of the video footage for him. (R. p. 97, ll. 14-23) He was informed that the footage from both stores would be deleted after an unspecified number of days. *Id.* Sheumpert then took several photographs of the video surveillance footage at McDonalds' on his cell phone and recorded a video on his cell phone of a portion of the Marathon video footage. (R. p. 99, ll. 3-22); (State's Exhibits R. p.228-232).

At trial the State successfully moved into evidence over defense counsel's objection the photographs of the McDonalds' surveillance footage under the business record exception to hearsay. (R. p. 98, ll. 5-20) The State never called any McDonalds' employee who was familiar with the video surveillance system in place on either the day the photograph purported to show or on the unspecified day that Sheumpert visited. Troublingly, the photograph also lacked a date stamp or any indicator that the photograph showed video footage from June 12, 2012.

The State also attempted to enter the cell phone video footage from the Marathon gas station surveillance video into evidence under Rule 803(6), SCRE. (R. p. 129, l. 11 - 135, l. 11) Unlike the McDonalds' photograph, the State had the current Marathon station manager testify that she

recognized the video footage to be of her store. (R. p. 126, l. 12 - 129, l. 8) Nevertheless, the trial court suppressed the video footage because the manager was not working at that location at the time of the incident and she could not testify as to the recording keeping system in place for video surveillance at the time of Appellant's alleged visit. (R. p. 132, l. 21 - 134, l. 20)

Discussion

In addition to suppressing the cell phone video of the Marathon surveillance footage, the trial court should have also suppressed the still photographs taken by Sheumpert of the McDonalds' surveillance video. (R. p. 98, ll. 5-20) In both instances the State failed to produce a custodian or other qualified witness able to testify about the record keeping method in place for video surveillance footage at the time that the white truck visited or at the time of Sheupert's visit.

Without such testimony, the photographs and the video should have been inadmissible as there was no way to insure that the underlying video surveillance was a reliable presentation of what occurred, particularly as the photograph lacked a date stamp.² *See: Ex parte Dep't of Health & Env'tl. Control*, 350 S.C. 243, 249-50, 565 S.E.2d 293, 297 (2002) (business records are admissible under Rule 803(6) and section 19-5-510 "as long as they are (1) prepared near the time of the event recorded; (2) *prepared by someone with or from information transmitted by a person with knowledge*; (3) prepared in the regular course of business; (4) *identified by a qualified witness who can testify regarding the mode of preparation of the record*; and (5) found to be trustworthy by the court") (*emphasis added*).

² The trial court ruled the video footage from the Marathon Station inadmissible because the State could not meet the requirements of Rule 803(6), SCRE, or S.C. Code Ann. § 19-5-510. As such the court should have also ruled that the photographs taken from the surveillance footage were inadmissible. (R. p. 156, l. 1 - 159, l. 5); (State's Exhibits R. p.230 - 232).

While correctly ruling the Marathon video inadmissible, the court reversibly erred in allowing the State to enter in Sheumpert's McDonalds' photograph into evidence. Sheumpert testified he had no knowledge of the way in which the video cameras at the restaurant were arranged or how the program that stored the videos operated. (R. p. 95, l. 23 - 97, l. 22); *McFarlane*, 279 S.C. at 330, 306 S.E.2d at 613 (detective was not a qualified witness as he could not testify regarding the identity or mode of preparation of the medical report). Thus, he was not a "qualified witness who can testify regarding the mode of preparation of the record" within the requirements of Rule 803(6) or § 19-5-510.

The State not only failed to produce a custodian or other qualified witness, they also failed to establish a chain of custody insuring that the photographs were an accurate representation of surveillance video footage. Rule 803(6) requires that a proper foundation be laid prior to the admittance of a purposed business record. *Stevens*, 366 S.C. at 454-55, 520 S.E.2d at 633 (*citing Benton v. Pellum*, 232 S.C. 26, 100 S.E.2d, 534, 537 (1957)). The State should have been required to, "as far as is practicable" present a complete chain of evidence establishing the accuracy of the underlying video surveillance footage. *Benton*, 232 S.C. at 33-34, 100 S.E.2d at 537.

Moreover, the State should have produced testimony from someone with knowledge of the restaurant's surveillance camera arrangement and video retention software as it operated on the date of Appellant's alleged visit to establish the foundation and chain of evidence required under Rule 803(6) and § 19-5-510 to assure the reliability of such evidence.

Harmless Error

While the admission of evidence is subject to harmless error analysis, it does not apply to the instant case because the Sheupert's photographs are the spoke in the wheel that connects the State's other evidence to Appellant. The photograph shows a white pick-up truck going through a

McDonalds' drive through. (State's Exhibit No.: 3). Lang's credit card statement reported a post-robbery charge at the same McDonalds'. However, the identity of the individuals in the truck cannot be determined based on the photograph. Additionally, the McDonalds' photograph is undated, thus Hilton's testimony is necessary to connect the white truck in the photograph to the robbery and to Appellant.

In this manner the photograph also bolsters Hilton's credibility. Less than a month before trial, Hilton agreed to testify against Appellant. Until that point, Hilton had denied any involvement in the robbery and had provided law enforcement with several versions of events. (R. p. 162, l. 5 - 165, l. 25) Facing a potential twenty-five year sentence and with his wife now also incarcerated for attempting to smuggle drugs to him in pre-trial detention, Hilton decided to make a deal.

In his final version of events, Hilton testified at trial that he and Appellant committed the robbery in Appellant's white truck. (R. p. 146, l. 13-25) After the robbery, they then went to the Marathon and to the McDonalds'. (R. p. 153, l. 19 - 154, l. 14) The State was never able to locate the white truck and there were no DMV records indicating Appellant owned or leased one, but Hilton helpfully claimed that Appellant traded in the truck "under the table" after the robbery. (R. p. 107, l. 22 - 108, l. 7)

The photograph becomes essential to the State's case once the trial court ruled that the video footage from the Marathon station was inadmissible. In summation, Sheumpert's photographs are the only visual link that supports Hilton's testimony and, therefore, connects Appellant to the use of Lang's credit card. *State v. Davis*, 371 S.C. 170, 638 S.E.2d 170 (2006) (admission of hearsay statement was not harmless statement to witness was a crucial piece of evidence linking defendant both to the scene of the crime and the murder weapon).

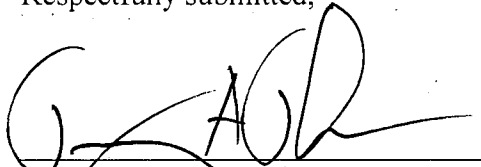
Furthermore, the State emphasized the photograph in its closing argument. *Chaffee v. State*, 294 S.C. 88, 362 S.E.2d 875 (1987) (where solicitor avails himself of evidentiary error in closing argument, the error is not harmless). Assistant Solicitor Usry stressed that: “Joshua Hilton’s testimony isn’t the only evidence we have. We have Ms. Lang’s credit card statement and we have pictures. . .” (R. p. 190, l. 24 - 191, l. 2)

Accordingly, the trial court abused its discretion in admitting Sheumpert’s photograph because it did not meet the requirements of the business record exceptions under Rule 803(6), SCRE, and § 19-5-510 and its admission into evidence was not harmless error.

CONCLUSION

Based on the foregoing reasons, Appellant Keith Osborne respectfully requests that this Court reverse his conviction and sentence and remand his case to the Lexington County Court of General Sessions for a new trial.

Respectfully submitted,



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