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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

Honorable Roger L. Couch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TIMOTHY WAYNE JOHNSON,

APPELLANT

APPELLATE CASE NO 2016-000608

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial judge erred in admitting evidence of Appellant's involvement in a May 23rd shoplifting incident at Appellant's trial for receiving stolen goods where the prior incident was irrelevant to the jury's determination of whether Appellant knew that the Mercury Grand Marquis he drove on May 24th was stolen?

STATEMENT OF THE CASE

On October 23, 2015, Appellant Timothy Wayne Johnson was indicted for receiving stolen goods valued more than two thousand dollars but less than ten thousand dollars. R. 347-348.

On March 14-16, 2016, Johnson appeared for trial before the Honorable Roger L. Couch and a jury. Johnson was represented by Matthew Shealy, and the State was represented by assistant solicitors Allison Mabbs and Russell Ghent. R. 1. Prior to jury selection, Johnson pled guilty to shoplifting, related to an incident at Burlington Coat Factory on May 23, 2015. Judge Coach accepted the guilty plea but deferred sentencing until after trial on the receiving stolen goods charge. R. 10, l. 1 – 22, l. 15.

The jury found Johnson guilty of receiving stolen goods. R. 334, ll. 14-24. Judge Couch sentenced Johnson to ten years, suspended upon the service of three years, with five years of probation, and restitution of $725.00. Judge Couch ran that sentence consecutive to the ten-year sentence that he imposed on the shoplifting charge. R. 344, l. 13 – 345, l. 11. The penalties for both offenses were enhanced due to prior convictions. S.C. CODE ANN. § 16-1-57 ("A person convicted of an offense for which the term of imprisonment is contingent upon the value of the property involved must, upon conviction for a third or subsequent offense, be punished as prescribed for a Class E felony."); S.C. CODE ANN. § 16-1-20(A)(5) ("A person convicted of classified offenses, must be imprisoned as follows: . . . for a Class E felony, not more than ten years.").

This appeal follows.

ARGUMENT

The trial judge erred in admitting evidence of Appellant's involvement in a May 23rd shoplifting incident at Appellant's trial for receiving stolen goods where the prior incident was irrelevant to the jury's determination of whether Appellant knew that the Mercury Grand Marquis he drove on May 24th was stolen.

Introduction

Appellant Johnson was charged with shoplifting arising from the theft of goods from a Burlington Coat Factory on May 23, 2015. On that day, he was seen getting into a Dodge Durango. Johnson was also charged with possession of stolen goods, specifically a 2001 Mercury Grand Marquis, which he was allegedly seen driving when he returned to the Burlington Coat Factory on May 24, 2015 and which was found parked behind the house where he was staying later that same day. Prior to his trial for receiving stolen goods, Appellant Johnson pled guilty to the May 23, 2015 shoplifting incident. Defense counsel argued that the shoplifting incident should not be mentioned to the jury during his trial for receiving stolen goods because it was irrelevant. R. 82, ll. 4-23. The trial judge ruled that the witnesses could not indicate that Johnson was convicted of or pled guilty to "shoplifting," but they could reference the incident as "an ongoing investigation into criminal activity." R. 82, l. 24 – 84, l. 21. The judge said: "I will exclude using the word shoplifting but I would think that they'll probably surmise that that's what was going on." R. 83, l. 24 – 84, l. 1.

Johnson's defense to the possession of stolen goods charge was that he did not know that the Grand Marquis was stolen. R. 111, ll. 7-19; R. 289, l. 24 – 293, l. 25. To that end, the defense presented testimony from his girlfriend, Jackie Gregory, who said that she exchanged drugs with a fellow addict, Brian Turner, to rent the Grand Marquis on May 24, 2015. R. 260, l. 1 – 263, l. 25. She told Johnson that she rented the car from a friend. R. 261, l. 18 – 262, l. 17; R. 267, ll. 21-24. Gregory admitted that they drove the Grand Marquis to Burlington Coat

Factory that day. R. 263, ll. 1-3. However, she said that neither she nor Johnson had any idea that it was stolen. R. 262, l. 18 – 263, l. 25; R. 271, l. 6 – 274, l. 7.

Relevant Facts

The Events of May 23, 2015

The Burlington Coat Factory loss prevention officer, Sean Warrick, saw Johnson at approximately 6:00 p.m. on May 23, 2015. Johnson approached Warrick outside of the store and asked whether they carried a very large size of shorts. R. 173, ll. 5-14. When Warrick's smoke break was over, he returned inside. He kept an eye on Johnson because he thought that he "might be up to something" since Johnson stayed in the store for approximately one hour and went to various departments. R. 173, ll. 15-20; R. 175, ll. 11-12; R. 173, l. 3 – 184, l. 18. When Warrick followed a second man who he suspected of shoplifting toward the back of the store, he was notified to return to front because "someone had left the store with some of our merchandise." R. 173, l. 21 – 174, l. 10.

Justina Esopa, another Burlington employee, who was at the front of the store, heard the alarms sound and offered to take the sensor off for the man who had just left. R. 138, ll. 2-21. He was walking away from her and glancing back, at which point she said "oh, I see what's happening." R. 138, ll. 22-24. Esopa further testified:

> So he begins to – he's pushing a buggy full of clothing. He takes the clothing out of the buggy, places it in the back seat of a SUV type car. It was a black Durango at the time. There is a man driving. There's also a woman in the back seat in the same seat he's putting clothes in. He hops in the car, drops a pair of shoes, knocks the buggy over, and they back out and turn away.

R. 138, l. 24 – 139, l. 6. By the time that Warrick got outside, the Durango was gone. However, he later reviewed the closed circuit television recording, based upon which he said: "I have him

on the TV running out the store." R. 174, ll. 1-25; R. 186, ll. 6-21. This is the testimony that defense counsel moved to exclude. R. 82, ll. 4-15.

Michael Brewton drove a grayish-green colored 2011 Mercury Grand Marquis. He left it running outside of the Lil' Cricket on May 23, 2015. Brewton was unsure of the time, but he recalled that it was evening time and dark outside. While he was purchasing some items inside of the store, he saw a man jump into his car and drive away. R. 115, l. 22 – 117, l. 22.

The Events of May 24, 2015

Jackie Gregory, Johnson's girlfriend, exchanged drugs with a fellow addict, Brian Turner, to rent what she thought was his Mercury Grand Marquis on May 24, 2015. She did not suspect that the car was stolen because Turner's "family has a little of bit [of] money." R. 260, l. 1 – 263, l. 25. When Johnson returned from work, she told him that she rented the car from a friend, which was common among drug addicts.[1] R. 261, l. 18 – 262, l. 17. The solicitor implied that Johnson should have known that a vehicle "rented" by Gregory was stolen because of her criminal record. However, Gregory pointed out that she had never been charged with receiving stolen goods until the May 24th incident and that the rest of her charges from 2015 all occurred after that date. R. 265, l. 9 – 269, l. 20; R. 274, l. 8 – 276, l. 1.

Esopa, the Burlington Coat Factory clerk, saw Johnson again on May 24, 2015, at approximately 10:00 a.m. She claimed that Johnson was sitting on the hood of a light-colored car and a woman was standing outside of it. When they saw Esposa, they got back into the car

[1] A "crack rental" involves the rental of a car in exchange for crack cocaine. See People v. Bass, 2016 WL 4768660 (Mich. Ct. App. Sept. 13, 2016); United States v. Key, 599 F.3d 469, 473 (5th Cir. 2010).

and quickly left.[2] R. 139, l. 19 – 140, l. 10. Esopa identified the photographs of Brewton's stolen vehicle as the vehicle that Johnson and the woman were using on May 24, 2015. R. 140, l. 15 – 141, l. 12.

Later that day, a woman came into the Burlington Coat Factory and attempted to return some items without a receipt. The store clerks attempted to delay her but she eventually left. Warrick followed her outside, where he saw the woman walking towards the Gold's Gym located in the same shopping complex. Warrick saw Johnson drive up in the Grand Marquis and pick the woman up. R. 176, l. 19 – 178, l. 25. Jackie Gregory admitted that they drove the Grand Marquis to Burlington Coat Factory that day. R. 262, ll. 1-3.

Sometime between 2:00 and 4:30 p.m., Brewton and his wife were driving by a house approximately one-quarter mile from the Lil' Cricket when they saw a car that looked like their missing vehicle parked behind a house. R. 118, l. 19 – 119, l. 3; R. 119, ll. 8-24; R. 120, ll. 18-24; R. 130, l. 20 – 131, l. 9; R. 136, ll. 3-11; R. 201, ll. 12-19. They got closer and determined that the license plate matched. R. 119, ll. 3-5. Brewton went to the door and spoke to two women, both of whom denied knowing anything about the car. Brewton and his wife both claimed that they could see a man peeking out through the blinds. R. 121, l. 2 – 122, l. 11; R. 131, l. 13 – 132, l. 19. They called police. R. 119, l. 7; R. 131, ll. 10-12. The women purportedly consented to a search of the home when police arrived. Johnson was found hiding in the attic. R. 197, ll. 17-25; R. 201, ll. 23-24; R. 204, ll. 15-22.

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[2] The loss prevention officer, Sean Warrick, provided testimony indicating that he had also seen Johnson sitting on the hood of a light-colored vehicle on the morning on May 24, 2015. R. 175, l. 17 – 176, l. 21; R. 177, ll. 14-16; R. 179, ll. 1-4. However, he admitted on cross-examination that he did not see Johnson that morning. Rather, the information about Johnson sitting on the hood of the car was hearsay, relayed to him by Justina Esopa. R. 187, l. 2 – 188, l. 23.

Motion to Exclude

Defense counsel made a pre-trial motion to exclude any mention of the shoplifting incident on May 23, 2015. R. 82, ll. 4-23. Defense counsel acknowledged that loss prevention officer Warrick's identification from May 24th was ruled admissible, but argued that any mention of the events of the May 23rd were irrelevant to the receiving stolen goods charge. R. 82, ll. 16-22. The trial judge ruled that he would "allow the witness to testify that he was observing this individual or individuals as a result of an ongoing investigation into criminal activity." R. 82, l. 24 – 83, l. 2. He explained that Warrick's observations of Johnson during the shoplifting incident were relevant to the reliability of his identification of Johnson the next day. R. 83, l. 13 – 84, l. 13. However, he instructed the solicitor to caution his witnesses not to say that Johnson was convicted of shoplifting but rather to say that it was "part of an ongoing criminal investigation." R. 84, ll. 15-19.

Discussion

"Relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE; see also State v. Alexander, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991) ("Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears."). "Evidence which is not relevant is not admissible." Rule 402, SCRE. "Evidence should be excluded if it is . . . irrelevant or unnecessary to substantiate the facts." State v. Stokes, 339 S.C. 154, 159, 528 S.E.2d 430, 432 (Ct. App. 2000), (quoting State v. Langley, 334 S.C. 643, 647, 515 S.E.2d 98, 100 (1999)). Courts must be extremely careful not to permit evidence of a tendency to excite or

influence the resentment of jurors, and which does not tend to support the evidence or to connect the defendant with the commission of the crime. Id. (citations and quotations omitted).

In the present case, the Court accepted Johnson's guilty plea to the May 23rd shoplifting charge prior to the selection of the jury. Despite that, the judge allowed much of the evidence that would have been presented at a shoplifting trial to come into evidence at the trial on the receiving stolen goods. Both Warrick and Esopa were clear that a black Durango was used in the May 23rd shoplifting incident. In fact, the Grand Marquis had not even been stolen at the time of the 7:00 p.m. shoplifting, as Brewton testified that it was dark outside when he was parked at the Lil' Cricket. See R. 116, ll. 11-15. The testimony regarding the May 23rd incident did nothing more than confuse the issues before the jury and show Johnson's propensity for dishonesty and committing property crimes.

Assuming *arguendo* that any testimony regarding May 23rd did have some limited relevance to the reliability of the May 24th identification, the trial judge's ruling was still too broad. Warrick could have simply testified that on May 23rd, he spoke with Johnson for approximately two minutes outside of the store and observed him in various departments of the store over the approximately one hour that he was inside. Esopa could have testified that she saw Johnson as he was leaving the store and getting into a black Durango. They could have also testified as to the lighting, the details of what they observed about Johnson's appearance, and their degree of attention. Such testimony would have provided sufficient information to support the reliability of their identifications of Johnson on May 24, 2016.

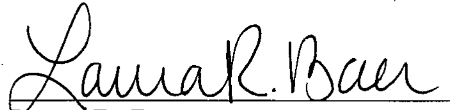
Instead, their testimony left no question that Johnson was involved in shoplifting at the Burlington Coat Factory. Warrick said that he "was told that someone had left the store with some of our merchandise" and that the closed circuit television showed Johnson "running out of

the store." R. 174, ll. 1-25; R. 186, ll. 11-22. Esopa described the alarm sounding, offering to take off the sensor, and then realizing "what's happening." R. 138, ll. 12-24. She then described Johnson pushing a buggy full of clothing, taking the clothing out to put into a black Durango, knocking the buggy over, and riding away. R. 138, l. 24 – 139, l. 6. She then attempted to call the license plate number to the loss prevention officer over her headset. R. 139, ll. 6-9. Their detailed testimony of the events of May 23rd was simply unnecessary to the jury's determination of the reliability of their identifications of Johnson on May 24th.

Therefore, the testimony regarding the May 23rd shoplifting incident should not have been admitted at Johnson's trial for receiving stolen goods, or at the very least should have been further restricted so that it did not so plainly reveal to the jury that Johnson was under suspicion for shoplifting.

CONCLUSION

Based on the foregoing, Appellant Timothy Wayne Johnson respectfully requests that this Court reverse his conviction and remand his case for a new trial.



Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT

This 31st day of January, 2017.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief 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."

Respectfully Submitted,

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This 31st day of January, 2017.

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