

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED

Appeal from Horry County

FEB 09 2018

Honorable Larry B. Hyman, Circuit Court Judge

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

JOSHUA WILLIAM MAIDEN,

APPELLANT

APPELLATE CASE NO. 2017-000915

ANDERS BRIEF OF APPELLANT

ROBERT M. DUDEK
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TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL.....1

STATEMENT OF THE CASE.....2

ARGUMENT

The court erred by reversing its earlier exclusion, and admitting a Facebook video, state’s exhibit 5, of the drunken patrons of the Boathouse, where there was no foundation as to the completeness or accuracy of the Facebook video which included appellant and Alexander Miniet in an altercation, and where the undue prejudicial effect of the drunken video outweighed its probative value under Rule 403, SCRE3

Relevant Facts3

Discussion6

CONCLUSION.....9

PETITION TO BE RELIEVED AS COUNSEL10

TABLE OF AUTHORITIES

Cases

Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 526 (2000)..... 6

State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991)..... 7

State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941)..... 7, 8

State v. Jeffcoat, 279 S.C. 167, 303 S.E.2d 855 (1983)..... 7

Statutes

Rule 403, SCRE..... 3, 5, 8

Rule 901(a), SCRE..... 6

Other Authorities

29A Am. Jur. 2D Evidence § 996..... 6

STATEMENT OF ISSUE ON APPEAL

Whether the court erred by reversing its earlier exclusion, and admitting a Facebook video, state's exhibit 5, of the drunken patrons of the Boathouse, where there was no foundation as to the completeness or accuracy of the Facebook video which included appellant and Alexander Miniet in an altercation, and where the unduly prejudicial effect of the drunken video outweighed its probative value under Rule 403, SCRE?

STATEMENT OF THE CASE

Appellant was indicted by the Horry County Grand Jury for the offense of attempted murder. R. 321. His case was called to trial on April 10, 2017, before the Honorable Larry B. Hyman, Jr., and a jury. Seth A. Oskin and George H. DeBusk, Jr., were the assistant solicitors. J. Eric Fox represented appellant. R. 1.

On April 12, 2017, the jury found appellant not guilty of attempted murder but they found him guilty of assault and battery of a high and aggravated nature (ABHAN). R. 303, l. 22 – 304, l. 3. Judge Hyman sentenced appellant to twenty years imprisonment. R. 317, ll. 7-10.

This appeal follows.

ARGUMENT

The court erred by reversing its earlier exclusion, and admitting a Facebook video, state's exhibit 5, of the drunken patrons of the Boathouse, where there was no foundation as to the completeness or accuracy of the Facebook video which included appellant and Alexander Miniet in an altercation, and where the unduly prejudicial effect of the drunken video outweighed its probative value under Rule 403, SCRE.

Relevant Facts

On May 22, 2016, appellant Joshua Maiden was dating Victoria Hubbard. Victoria had a son, who was five months old at the time, with Alex Miniet. R. 218, ll. 10-16. Appellant had dated Victoria before her brief relationship with Miniet. Appellant related, "After they split up we did work things out and got back together." R. 218, ll. 20-24.

Appellant described to the jury how Miniet stalked him and Victoria. In October, 2015, Victoria and appellant went to the House of Blues in Myrtle Beach to see a band. They arrived early to have dinner. While they were having dinner, Miniet showed up with other members of his motorcycle gang. Appellant remembered that Miniet insulted Victoria and was confrontational with her that evening. Miniet left before anything physical happened at the House of Blues that night. R. 219, l. 15 – 222, l. 7.

Appellant remembered another incident where he was waiting tables at T-Bonz at the beach about a month later. Miniet came into the restaurant, and requested to the hostess that appellant be his waiter. Appellant was able to get the manager to have someone else wait on Miniet, and Miniet left. Appellant remembered that Miniet called him "a pussy," and "a bitch," which was not unusual for Miniet. R. 223, l. 21 – 224, l. 10.

Appellant testified that Victoria filed for government assistance “to help take care of the child.” The state then sought to recapture the assistance it paid Victoria from Miniet, the father. R. 225, ll. 2-22. Appellant said Miniet was very bitter towards him and Victoria from that point forward.

On the night of the incident at the Boathouse on Highway 501 in Myrtle Beach, Miniet testified that he was walking to a Porta John by the volleyball courts when he saw appellant come up to him. Miniet said appellant “touched me on the shoulder, I looked over and he said, exact words were, Are we cool? And my exact words were to him, I have nothing to say to you. Just leave me alone.” R. 177, ll. 17-22. Miniet claimed he was only at the Boathouse that night to watch appellant and Victoria with his five month-old son. R. 177, ll. 23-24.

It was undisputed that Miniet and appellant fought at one point at the Boathouse that May evening, and that appellant hit him with a bottle during the altercation. Miniet admitted he had threatened to kill appellant in the past, but he claimed he only meant he would harm appellant if appellant hit Victoria.¹ R. 197, l. 2 – 198, l. 2.

After the fight inside the Boathouse, both appellant and Miniet were escorted from the bar. Miniet said appellant deliberately hit him and ran over him in the parking lot afterwards. R. 198, l. 10 – 202, l. 20. Miniet’s claim was that appellant deliberately hit him and ran over him. Appellant conversely testified he thought Miniet was approaching him with a gun because Miniet had threatened to kill him before – put a bullet between his eyes -- and appellant ducked down behind his steering wheel and accelerated. He did not mean to hit or run over Miniet but he was very frightened at the time. R. 236, l. 9 – 237, l. 20.

¹ Miniet claimed that his motorcycle gang was “nothing like the Hell’s Angels” while he disputed his intent to harm appellant.

The state wanted to introduce a Facebook videotape of part of the events at the Boathouse that night. The trial judge initially would not allow it to be introduced into evidence. Matthew Chiviatone was working security at the Boathouse on the night of the incident. He testified State's Exhibit 5 was "a video of the initial fight inside." Matthew said that he did not see the beginning of the fight but he recognized himself on the videotape. Defense counsel objected to lack of foundation for the Facebook video as far as who recorded the video, where the video had been since it was made, and general concerns about the videotape being accurate, and not manipulated or edited. R. 125, l. 13 – 127, l. 19.

The judge ruled he was not going to allow the Facebook video into evidence because there was not a witness to say he had recorded the incident, and no testimony that the video had not been altered since it was recorded. R. 127, ll. 15-19. The judge also noted the extraneous "idiot" activities on the videotape, and he noted that the person who recorded the videotape was not even available as a witness. R. 131, l. 15 – 133, l. 4.

Later, when Miniet testified, he said he was present when the video was taken at the Boathouse. Miniet claimed the video had not been altered or edited "to your knowledge." R. 178, l. 20 – 179, l. 17. Defense counsel again objected to the lack of a foundation as to who took the video, how it was placed on Facebook, its accuracy, completeness, and again to the lack of a proper foundation for the videotape to be admitted. This time, the judge ruled that because Miniet said it was a fair and accurate depiction of what occurred that he was admitting the video into evidence. R. 179, l. 13 – 180, l. 4. The judge also ruled he had considered the probative value versus the unduly prejudicial effect of the Facebook video under Rule 403, and that he was admitting the video over the foundation and Rule 403, SCRE objections. R. 179, l. 13 – 180, l. 8.

The videotape which is before this Court as State's Exhibit 5 shows a drunken scene at the Boathouse in early evening with patrons acting foolishly while intoxicated. One drunken man obsessed with women's breasts, asks women to show off their breasts. The Facebook video did, at one point, depict a man, apparently Miniet, being hit with a beer bottle. The drunken breast obsessed man narrates "the fight" as if he was Howard Cosell. Defense counsel correctly argued the lack of the foundation as to when the incident began, and that the accuracy and completeness of the Facebook video was unclear. The judge ultimately charged the jury on attempted murder, ABHAN, and assault and battery in the second degree. R. 298, I. 1 – 299, I. 17.

The judge did charge that the state had to prove a specific intent to kill to convict appellant of attempted murder. As seen, the jury found appellant not guilty of attempted murder but guilty of ABHAN. The judge sentenced appellant to the maximum sentence of twenty years imprisonment. R. 317, II. 7-10.

Discussion

"The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. Rule 901(a), SCRE." Clark v. Cantrell, 339 S.C. 369, 396, 529 S.E.2d 526, 537 (2000). The judge in this case would not allow the Facebook video to be admitted through a bouncer who was present at the Boathouse that evening. However, with no additional foundation or authentication, the judge allowed the Facebook video to be admitted when Miniet testified that the videotape appeared accurate to him.

"The party who offers a videotape in evidence must show that it is an accurate, faithful representation of the place, person, or subject it purports to portray. This foundation must be laid

by someone having personal knowledge of the film's subject, that the film is an accurate portrayal of what it purports to show." 29A Am. Jur. 2D Evidence § 996. That did not occur in this case.

As this Court can see from state's exhibit 5 on file with this Court, the videotape of the prior altercation between appellant and Miniet was a brief sideshow to the drunken "boobies" activities shown on the Facebook video. It certainly did not leave a neutral juror thinking anyone in the video should be driving. The entire video was likely to confuse the jury regarding why it was being shown this videotape – its relevance – and it was very prejudicial in that jurors surely thought no one should be attempting to drive after what is depicted on this videotape.

Even when evidence is properly authenticated -- and the Facebook video was not in this case where there was no testimony that the Facebook video was a true, complete, unedited, and accurate depiction of what occurred -- *the video must still be admissible under other rules of evidence.* See State v. Jeffcoat, 279 S.C. 167, 303 S.E.2d 855 (1983).

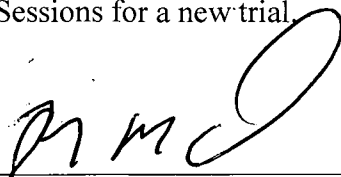
The judge here found that the probative value of the Facebook video was not substantially outweighed by its unfair prejudice pursuant to Rule 403, SCRE. The video had the unfortunate spurious tendency to lead the observer (Jurors) to think that all occupants of the Boathouse that evening were drunk, volatile, and largely irresponsible. It also had the tendency to mislead the jury since the only issue in this case was whether appellant hit Miniet on purpose with his car. If so, did appellant have the specific intent to kill him. The third option was that hitting Miniet with appellant's car was an accident. The drunken video was almost irrelevant to aiding the jury with answering this exclusively relevant inquiry.

The drunken prejudicial Facebook video should not have been admitted under Rule 403, SCRE. See, also State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991); State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941) (evidence can be excluded to avoid confusing the jury).

Miniet did not deny prior threats to kill appellant, and Miniet rejected appellant's peace offering earlier that evening when he asked: "Are we cool?" The state's questioning of witnesses was meant to show that appellant hit Miniet on purpose, and tried to kill him. It seems beyond dispute that there were serious prior problems between appellant and Miniet because of appellant's relationship with Victoria, who was the mother of Miniet's child. The Facebook video should have been excluded because it was not properly authenticated, and because its probative value was substantially outweighed by its risk of unfair prejudice, and its tendency to confuse or mislead the jury. See Rule 403, SCRE; State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941).

CONCLUSION

By reason of the foregoing arguments, appellant's conviction should be reversed, and this case remanded to the Horry County Court of General Sessions for a new trial.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 9th day of February, 2018.

STATE OF SOUTH CAROLINA
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Honorable Larry B. Hyman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOSHUA WILLIAM MAIDEN,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Joshua William Maiden states:

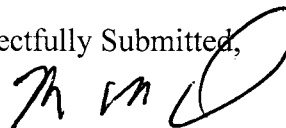
1.He is Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2.He has reviewed the record of appellant's trial before Judge Larry B. Hyman, which was held on April 10 - 12, 2017, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3.He 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, He asks the Court to relieve him as counsel for Joshua William Maiden.

Respectfully Submitted,



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

This 9th day of February, 2018.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Honorable Larry B. Hyman, Circuit Court Judge

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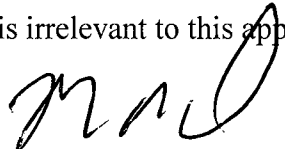
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) Entire Trial Transcript;
- (2) True-billed indictment;
- (3) State's Exhibit 5 (Boathouse drinking video)

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

February 9, 2018



Robert M. Dudek
Chief Appellate Defender

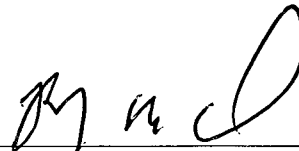
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ATTORNEY FOR APPELLANT

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."

February 9, 2018.



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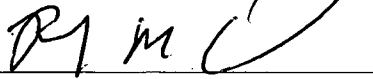
V.

JOSHUA WILLIAM MAIDEN,

APPELLANT


CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Joshua William Maiden, 370533, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 9th day of February, 2018.



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 9th day of February, 2018.

 (L.S)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.