

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Hampton County
Roger M. Young, Circuit Court Judge

ORIGINAL

RECEIVED
JUL 06 2018
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

MALCOLM ANTWON ORR,

APPELLANT

APPELLATE CASE NO 2017-001707

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in admitting portions of a video from a camera worn by the police officer where the video captured matters prior to and after the shooting and the probative value of those matters was substantially outweighed by the danger of unfair prejudice?

STATEMENT OF THE CASE

On February 1, 2016, a Hampton County grand jury indicted Appellant for attempted murder (2016-GS-25-0013) and possession of a weapon during the commission of a violent crime (2016-GS-25-0012). R. 337-338; R. 340-341. The state, represented by Isaac McDuffie Stone, III, and Brian Hollen, called the case to trial before the Honorable Roger M. Young, Sr., and a jury on August 7-9, 2017. R. 1. Robert Hughes represented Appellant. R. 1. When the trial judge instructed the jury regarding the elements of attempted murder, he told the jury that “[i]n order to prove attempted murder, the state must prove the defendant attempted to kill another person with malice aforethought, which is either express or implied.” R. 283, ll. 18-21. Thereafter, he defined malice and explained how it could be express or inferred. R. 283, l. 21 – R. 284, l. 25. Finally, he told the jury that “a specific intent to kill [was] not an element of attempted murder.” R. 284, l. 25 – R. 285, l. 1. Instead, there need only “be a general intent to commit serious bodily injury.” R. 285, ll. 2-3.¹

The jury found Appellant guilty as charged. R. 289, ll. 8-15. Judge Young sentenced Appellant to thirty years imprisonment for attempted murder. R. 298, ll. 12-13; R. 339. He also sentenced Appellant to five years imprisonment for the weapon. R. 298, ll. 13-15; R. 342. He ordered the sentences to be served consecutively. R. 298, ll. 13-15; R. 339; R. 342.

On August 10, 2017, Appellant served his notice of appeal. This brief follows.

¹ Although this Court held attempted murder requires a specific intent to kill on June 5, 2015, over two years prior to Appellant’s trial, trial counsel posed to no objection to the trial judge’s erroneous charge. See State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), aff’d as modified, State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017).

STANDARD OF REVIEW

“The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion.” State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” Id.; see also State v. Brockmeyer, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

ARGUMENT

The trial judge erred in admitting portions of a video from a camera worn by the police officer where the video captured matters prior to and after the shooting and the probative value of those matters was substantially outweighed by the danger of unfair prejudice.

Relevant facts

Officer Quincy Smith had been a member of the Estill Police Department for approximately six months on January 1, 2016, when he was called to a store regarding an individual trying to steal items from another individual. R. 123, ll. 16-25; R. 125, ll. 3-15. On his way to the store, Smith activated the camera in his glasses. R. 125, ll. 23-24. Smith had purchased the glasses from Amazon for \$30. R. 136, ll. 1-8. The camera captured quite a bit, including Smith going to the store, his interaction with a patron inside the store, his interaction with a possible suspect, the shooting, his retreat to his car, his conversation with the police dispatcher, his conversation with an individual who attempted to render aid, statements by other bystanders, and statements by law enforcement and medical personnel. State's Exhibit #39. In fact, a member of law enforcement took Smith's glasses and carried them around with him after Smith received medical attention. State's Exhibit #39. The glasses then captured the conversations among other members of law enforcement. State's Exhibit #39.

Prior to trial, defense counsel moved to suppress or redact portions of the video. Counsel explained that the first part of the video showed Smith "communicating with a third party," who alleged Appellant "was potentially involved in a strong-arm robbery." R. 69, ll. 3-7. Defense counsel explained Appellant was never charged with robbery, and the third party's statements regarding the robbery "would be very prejudicial, would be considered a potential prior bad act." R. 69, ll. 8-12. Additionally, defense counsel moved to suppress the final ten to fifteen minutes

of the video that concerned conduct after the confrontation between Smith and the shooter. R. 69, ll. 14-22. This portion included communication between Smith and the police dispatcher, between Smith and a civilian bystander, and other civilians in the background. R. 69, ll. 16-19. Defense counsel argued those portions lacked probative value. R. 69, ll. 19-20. Counsel also noted a portion of the video during which Smith told dispatch to tell his family that he loved them. R. 69, ll. 21-22. This portion “would be considered extremely prejudicial.” R. 69, ll. 21-22.

Further, defense counsel argued any probative value was “greatly outweighed by the prejudicial aspects of the blood, the tug on the heartstrings, and the sheer fact that there [was] nothing” in those portions of the video implicating Appellant’s guilt. R. 69, l. 23 – R. 70, l. 2.

Instead of responding to the objection as made by defense counsel, the state argued the video fell within a hearsay exception. R. 70, ll. 7-11. Concerning the beginning of the video, the prosecutor explained it showed “him responding to the call,” and that without that portion, it would look like “he’s just rolling up on somebody walking down the street and he starts yelling at him to stop.” R. 70, ll. 11-15. Appearing to argue another hearsay exception was applicable, the solicitor contended that the video was admissible as “res gestae” because it showed the purpose of Smith going to the store. R. 70, ll. 16-23. The state admitted the video showed a witness providing a description of a suspect, but claimed the video was admissible to establish why Smith was there, what he was doing, and why he was questioning the individual on the side of the road. R. 70, l. 24 – R. 71, l. 6.

Additionally, the solicitor argued the last ten to fifteen minutes of the video were admissible as “res gestae.” R. 71, ll. 19-20. The solicitor considered Smith’s belief that he was “going to die” as “particularly relevant” because the state charged Appellant with attempted

murder. R. 71, ll. 19-22. The state also considered the presence of blood as “particularly relevant” because Smith was “shot in the face, the neck, and the arm.” R. 71, ll. 22-25. This was somehow relevant to the charge, but not explained by the solicitor. R. 71, l. 25 – R. 72, l. 1. In sum, the solicitor believed the entirety of the video was “relevant to show what happened to this officer in that situation.” R. 72, ll. 15-19.

Judge Young determined there was “definitely probative value in both the things” defense counsel sought to redact. R. 72, ll. 23-25. According to the judge, “the first part” was “res gestae” because it showed “somebody at the store telling the police what happened and the description of the person ... [who] had just left,” which explained “why the police officer [was], in fact, searching for somebody.” R. 73, ll. 1-5. This was the “probative value” of the first part of the video. R. 73, ll. 1-5.

Concerning “the other end of the tape” when Smith told the dispatcher to tell his family he loved them, Judge Young found this showed Smith “definitely thought he was dying and had a possibility of dying.” R. 73, ll. 6-9. In the judge’s view, Smith’s statements on the tape would “certainly counter any argument that it was not a serious attempt to harm somebody.” R. 73, ll. 9-11. Recognizing that the attempted murder statute required the state prove “an attempt to take a life,” the judge thought Smith’s belief that he was dying was probative. R. 73, ll. 13-16.

Overall, the judge did not find the prejudicial effect to be “that high.” R. 73, ll. 16-17. “In both cases, the probative value certainly outweigh[ed] any prejudicial effect,” according to the judge. R. 73, ll. 17-19. Therefore, he denied defense counsel’s request to suppress portions of the video. R. 73, l. 19.

During the trial, Smith testified that he approached an individual near a wooded area because Smith believed the individual was the person who attempted to steal groceries from

another individual at the store. R. 126, l. 13 – R. 128, l. 8. Smith repeatedly told the individual, who was walking, to stop, but the individual continued walking away. R. 128, ll. 9-17. Smith pulled out his taser and threatened to shoot the individual if he did not stop. R. 141, ll. 17-20. In response to Smith’s threats, the individual pulled out a gun and shot Smith. R. 129, ll. 7-13.

Two firefighters arrived at the scene. R. 181, ll. 12-16; R. 182, ll. 2-5; R. 183, l. 25 – R. 184, l. 15. Both watched the video captured by the camera on Smith’s glasses. R. 182, ll. 5-8; R. 184, ll. 16-20. Both believed the individual in the video was Appellant. R. 182, ll. 12-25; R. 184, l. 21 – R. 185, l. 13.

A short while later, the police arrested Appellant. R. 196, l. 19 – R. 197, l. 4.

Discussion

Pursuant to the South Carolina Rules of Evidence, all relevant evidence is generally admissible; however, even relevant evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 402, SCRE; Rule 403, SCRE. A determination on the admissibility of relevant evidence requires consideration of the evidence’s probative value, the danger of unfair prejudice posed by the evidence, and the balancing of those two.

“‘Relevant evidence’ means 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. “Under Rule 401, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy.” State v. Preslar, 364 S.C. 466, 476, 613 S.E.2d 381, 386 (Ct. App. 2005). “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, and it is not required that the inference sought should necessarily follow from the

fact proved.” State v. Sweat, 362 S.C. 117, 126-127, 606 S.E.2d 508, 513 (Ct. App. 2004). “Evidence which assists a jury at arriving at the truth of an issue is relevant and admissible unless otherwise incompetent.” State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986)(citing Toole v. Salter, 249 S.C. 354, 361, 154 S.E.2d 434, 437 (1967)).

Probative value

When looking at Rule 403, SCRE, the starting point for analyzing evidence under Rule 403 is determining the probative value of the evidence offered. “‘Probative’ means ‘[t]ending to prove or disprove.’” State v. Gray, 408 S.C. 601, 609, 759 S.E.2d 160, 165 (Ct. App. 2014). According to this Court, “‘[p]robative value’ is the measure of the importance of that tendency to the outcome of a case.” Id. at 610, 759 S.E.2d at 165. While relevant evidence and probative evidence are not synonymous, the two share many similarities as demonstrated through their definitions. The probative value of evidence is directly related to the how important that evidence is in assisting the jury in rendering a verdict. Id. Thus, when analyzing the probative value of evidence, the court must consider the importance of the evidence as it relates to the issues presented in the case. State v. Lee, 399 S.C. 521, 528, 732 S.E.2d 225, 228 (Ct. App. 2012).

Danger of unfair prejudice

After determining the probative value of the evidence, the court must next evaluate the danger of unfair prejudice presented by the evidence. “The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case.” State v. Wilson, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001). “‘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 [a] decision on an improper basis.’” State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998)(quoting United States v. Bonds, 12 F.3d 540, 567

(6th Cir. 1993)). According to the United States Supreme Court, “[t]he term ‘unfair prejudice,’ as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.” Old Chief v. United States, 519 U.S. 172, 180 (1997). “Rule 403 only requires suppression of evidence that results in unfair prejudice – prejudice that damages an opponent for reasons other than its probative value, for instance, an appeal to emotion.” United States v. Mohr, 318 F.3d 613, 619-620 (4th Cir. 2003). Unfair prejudice means an undue tendency to suggestion a decision on an improper basis, commonly, but not necessarily, an emotional one. State v. Orozco, 392 S.C. 212, 218, 708 S.E.2d 227, 230 (Ct. App. 2011)(citing State v. Cheeseboro, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001)); see also State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991)(providing that “[e]vidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one”).

Balancing act

Once a court has determined the probative value and the danger of unfair prejudice of the evidence, the court must balance the two. State v. Dial, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013). “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. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008). Only after balancing the probative value and the danger of unfair prejudice may the court determine if the danger of unfair prejudice outweighs the probative value of the proffered evidence as required by Rule 403, SCRE.

Analysis

Applying this analytical framework to the present case reveals that balancing of the low probative value of the portions of the video defense counsel sought to redact and the extreme danger of unfair prejudice posed by the evidence necessitated the exclusion of portions of the video.

The starting point for determining the relevancy, probative value, and danger of unfair prejudice is with the ultimate issue before the jury. The question before the jury was – did the state prove beyond a reasonable doubt that Appellant had the specific intent to kill Smith with malice aforethought?

The initial portion of the video was not probative of any question before the jury. During the beginning of the video, Smith spoke to a woman who looked like a patron at the store. State's Exhibit #39. This woman did not testify at the trial. The woman told Smith that a person was standing nearby under some trees and that the person had tried to steal a bottle of liquor from a man. State's Exhibit #39. She also told the officer that the man from whom there had been an attempted theft jumped in his car and left the store. State's Exhibit #39. The statements by the woman to the officer were not probative of any issue before the jury. The woman's statements served only to impugn Appellant's character and make unfounded accusations of criminal conduct against him. When the woman did not testify at his trial, Appellant was unable to cross-examine her regarding her accusations. The probative value of the initial portion of the video was extremely low.

Due to the woman's statements assassinating Appellant's character and accusing him of trying to steal from someone, the danger of unfair prejudice was extremely high. The jury was left with the woman's unchallenged statements that Appellant had engaged in criminal conduct.

The portion of the video that captured events after the shooting were likewise of little probative value regarding the issue before the jury. State's Exhibit #39. The video showed Smith

interacting with dispatch and other individuals. State's Exhibit #39. The video also showed his interaction with a bystander, who ultimately testified at trial. State's Exhibit #39. When the other police officers arrived with medical personnel, there was nothing captured on the video that concerned the offense. State's Exhibit #39.

Rather, everything on the video after the shooting posed a danger of unfair prejudice to Appellant. The video captured showed Smith's blood on his hands and inside and outside of the police car. State's Exhibit #39. During this time, Smith actually told the dispatcher to tell his family he loved them. State's Exhibit #39. This could only serve to inflame the passions of the jury. At one point, individuals who appeared to be Smith's family members arrived. State's Exhibit #39. The family members expressed extreme emotions regarding Smith's condition, and even prayed over him. State's Exhibit #39. At one point, a woman prayed that he not die "in the name of Jesus." State's Exhibit #39. The prayer and the family's emotional reaction could serve only arouse the jurors' emotions. Thus, the danger of unfair prejudice was extremely high concerning the last portion of the video.

Only one conclusion may be drawn from balancing the extreme danger of unfair prejudice resulting from the admission of the challenged portions of the video against their low probative value - - any probative value of the portions of the video was substantially outweighed by the danger of unfair prejudice.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and remand for a new trial.

Respectfully Submitted,

Susan B. Hackett

Susan B. Hackett

Appellate Defender

ATTORNEY FOR APPELLANT

This 6th day of July, 2018.

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IN THE COURT OF APPEALS

Appeal from Hampton County
Roger M. Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MALCOLM ANTWON ORR,

APPELLANT

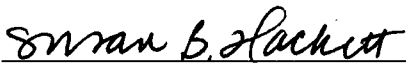
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Malcolm Antwon Orr states:

- (1) She is an 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 Roger M. Young, which was held on August 7-10, 2017, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
- (3) Pursuant to Anders v. California, 386 U.S. 738 (1967), she has briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Malcolm Antwon Orr.

Respectfully Submitted,



Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

This 6th day of July, 2018.

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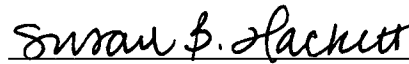
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (4) Entire trial transcript dated August 7-9, 2017;
- (5) State's Exhibit #1 (911 call);
- (6) State's Exhibit # 39 (Body Camera video);
- (7) True-billed indictments; and
- (8) Sentence sheets.

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

July 6, 2018.



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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."

July 6, 2018.

Susan B. Hackett

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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 Malcolm Antwon Orr, 329462, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 6th day of July, 2018.

Susan B. Hackett
Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 6th day of July, 2018.

Jawrin Stearns (L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027