ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Spartanburg County

Honorable R. Keith Kelly, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DONALD SCOTT ROBERTSON,

APPELLANT

APPELLATE CASE NO. 2017-001656

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred when it admitted the watch into evidence when the watch was not relevant to prove any element of the crimes alleged, and if it was relevant, its probative value was substantially outweighed by its unfair prejudice to Appellant because there was no sufficient nexus to connect Appellant to the watch?

STATEMENT OF THE CASE

The Spartanburg County Grand Jury indicted Appellant on October 28, 2016 for two counts of kidnapping, one count of burglary, one count of possession of a weapon during the commission of a violent crime, and one count of armed robbery. R. *.

On July 24 – 26, 2017, Appellant's trial was held in front of the Honorable R. Keith Kelly and a jury. Tr. 1. Spencer H. Smith and Blythe H. Walters represented the state. Id. Daniel James MacDonald and Matthew W. Shealy represented Appellant. Id. After a three-day trial, Appellant was convicted on all charges. Tr. 384, ll. 8 – 24. Judge Kelly sentenced Appellant to life without parole pursuant to S.C. Code Ann. § 17-25-45. Id. This appeal follows.

STANDARD OF REVIEW

"The admission of evidence is within the circuit court's discretion and will not be reversed on appeal absent an abuse of that discretion." State v. Dickerson, 395 S.C. 101, 116, 716 S.E.2d 895, 903 (2011). "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); see also State v. Dial, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013) ("A trial judge's decision regarding the comparative probative value and prejudicial effect of relevant evidence should be reversed only in exceptional circumstances." (citation omitted)).

ARGUMENT

The trial court erred when it admitted the watch into evidence when the watch was not relevant to prove any element of the crimes alleged, and if it was relevant, its probative value was substantially outweighed by its unfair prejudice to Appellant because there was no sufficient nexus to connect Appellant to the watch.

Relevant Facts

The facts alleged by the state are as follows. On June 17, 2016, Appellant allegedly entered Geri Smith and Albert Williams' apartment while they were out. Tr. 62, l. 17 – 63, l. 5. Appellant was still inside the apartment when Smith and Williams returned. Tr. 63, ll. 3 – 13. Appellant allegedly took items from Smith and Williams at gun point and had them drive to their bank to withdraw money from one of their accounts. Tr. 63, ll. 13 – 19. Appellant allegedly took off the ski mask he was wearing while they drove to the bank. Tr. 72, ll. 20 - 2. When speaking to the police after the incident, Smith gave the sketch artist a description of Appellant. Tr. 32, l. 7 – 33, l. 4. Williams was never asked to give a sketch description.

While Smith talked to the sketch artist, police officers went out to investigate the incident. Tr. 33, ll. 1 – 3. Officer Clark testified that he, "spoke with other investigators in my unit about inci—the incident that had occurred… spoke with other investigators outside of my unit about incidents… and people from the area … at which time I was given Mr. Robertson's name as a person fitting the description of what I was describing." Tr. 32, l. 24 – 33, l. 11. Officer Clark made a photo array with Appellant in it to show to Geri Smith. Tr. 260, ll. 10 – 11. Smith identified Appellant as the alleged perpetrator. Tr. 265, ll. 5 – 15.

Officer Clark brought Appellant in for questioning and Appellant denied being involved in the robbery. Tr. 205, ll. 7 – 9. Appellant was homeless and described the place he would sometimes

stay as a wooded area off Highway 9 near a "Zaxby's." Tr. 271, ll. 12 – 15. Officer Clark found the spot that Appellant described behind the "Zaxby's" and searched the area for evidence. Tr. 272, l. 5 – 273, l. 11. Officer Clark found clothing and effects that allegedly belonged to Appellant, but no items from the robbery were found in the area. Tr. 272, ll. 12 – 19.

While Appellant was being questioned, he stated he was with his friend Terri Johnson at the time of the robbery. Tr. 204, ll. 14 – 15. Officer Clark, based on a total hunch, checked the Days Inn in the area to see if Appellant stayed there recently. Tr. 206, ll. 1 – 10. Johnson paid for and signed into a room at a Days Inn in the area around the time of the incident. Tr. 204, l. 25 – 205, l. 1.

Appellant was not staying at the Days Inn when Officer Clark arrived to speak with the Day's Inn owner, Mike Doshi. Doshi did not check Johnson into her room, and he could not say if anyone checked in with her. Tr. 199, ll. 20 – 23. Doshi showed the police Johnson's room registration form. Tr. 284, 6 – 9. On June 24, 2016, Appellant was arrested, but the police continued their investigation. Tr. 282, ll. 14 – 17.

In an attempt to reach Terri Johnson, the police went to the house where Johnson's mother lived. Tr. 284, l. 23 – 285, l. 7. They told her mother they needed to talk to Johnson. Id.

Johnson went to the sheriff's office where police informed her of the charges against Appellant. Tr. 285, l. 25 – 286, l. 15. It is unclear if Johnson said anything to police.

Almost two weeks after the robbery, Johnson called Officer Clark. Tr. 286, ll. 19 – 23. A day later, Johnson went to the sheriff's office and dropped off a gold watch. Tr. 288, l. 6 – 289, l 2. Officer Clark called Smith and asked if she was missing a watch from the robbery. Tr. 289, l. 25 – 290, l. 10. Smith accurately described the watch Officer Clark received from Johnson. Tr. 290, ll. 13 – 21. Terri Johnson did not testify at trial. Neither did she ever say how she obtained the watch.

At trial, the state attempted to admit into evidence the watch that Johnson gave Officer Clark. Tr. 289, ll. 15 – 21. Defense counsel made multiple objections to the relevancy of the watch. Tr. 214, l. 10 – 215, l. 20; 289, ll. 18 – 19. Defense counsel stated that the watch was given to the officer by a third party and not Appellant. Tr. 214, l. 23 – 215, l. 2. He further argued that since the watch was given nearly two weeks after the alleged incident occurred it could have changed hands any number of times, especially given the small size of the item. Tr. 214, ll. 14 – 22. Defense counsel described this time length as an "eternity" in evidentiary terms, because of the watch's small size and moveable nature. Tr. 214, ll. 19 – 20. Defense counsel argued that the state, "failed to establish how any of this is relevant to whether [the crimes alleged] happened or not... all they have established is that... my client may have been with Ms. Johnson when Ms. Johnson paid for a room on June 17th." Tr. 214, l. 25 – 215, l. 2.

The trial judge overruled both of defense counsel's objections and allowed the watch to be admitted into evidence. Tr. 289, ll. 20 – 21.

Discussion

The trial judge erred when he admitted the watch, and Officer Clark's testimony about the watch, pursuant to Rules 401, 402, and 403 SCRE because the state had no evidentiary predicate to admit the watch against Appellant to prove that he committed this robbery. Tr. 217, ll. 2 – 8.

Generally, all relevant evidence is admissible. Rule 402, SCRE. Relevant evidence is evidence having the tendency to make some matter in issue more or less probable. Rule 401, SCRE; State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009); State v. Crocker, 366 S.C. 394, 408, 621 S.E.2d 890, 898 (2005). However, even relevant evidence must "be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE.

Thus, consideration of whether evidence is relevant and admissible requires consideration of the evidence's probative value, the danger of unfair prejudice posed by the evidence, and the balancing of those two.

"'Probative' means '[t]ending to prove or disprove.'" State v. Gray, 408 S.C. 601, 609, 759 S.E.2d 160, 165 (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. The probative value of evidence is directly related to how important that evidence is in assisting the jury in rendering a verdict. Id. 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 (2012). In analyzing the probative value of evidence an appellate court, "considers the importance of the evidence and the significance of the issues to which the evidence relates." State v. Gray, 408 S.C. 601, 610, 759 S.E.2d 160, 165 (2014); see also State v. Torres, 390 S.C. 618, 703 S.E.2d 226 (2010).

To determine the prejudicial effect of offered evidence, an appellate court must look at the entire record. State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007). The result will generally turn on the facts of each case. Id. "'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 (1998)(quoting United States v. Bonds, 12 F.3d 540, 567 (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). Evidence that merits suppression for undue prejudice to defendant is such that it, "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 (2003).

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 (2013). 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.

Our Supreme Court's analysis of Rule 403 SCRE, in State v. Collins, 398 S.C. 197, 727 S.E.2d 751 (2012) provides a four-step guide for analyzing whether the danger of unfair prejudice resulting from proffered evidence outweighs the probative value. The first step is a determination of the probative value of the evidence. The second is an evaluation of the danger of unfair prejudice resulting from the introduction of the evidence. The third, is a balancing test the court must make between the probative value and unfair prejudice of the evidence in question. The fourth is the appellate court review of the decision of the trial court for an abuse of discretion. Id.

The aforementioned analytical framework, when applied to the present case, reveals that the low probative value of the watch was outweighed by the unfair prejudice posed to Appellant. The watch's relevancy, its probative value, and the danger of unfair prejudice is determined in regards to the ultimate issue before the jury. In the present case, the ultimate issue before the jury was whether Appellant committed kidnapping, burglary, armed robbery, and possession of a

weapon during the commission of a violent crime, and the watch was irrelevant to answering that question.

It was undisputed that Geri Smith and Albert Williams were involved the alleged crime. The only dispute between Appellant and the state was whether Appellant was the one who committed the alleged crimes against Smith and Williams. The admittance of the watch into evidence did not make it more or less probable that Appellant committed the crimes charged against him, and therefore it was not relevant. Admittance of the watch only made more probable a fact that was undisputed, namely that items had been taken from Smith. Moreover, the watch was given to police by a third party almost two weeks after the incident. Defense counsel described this time length as an "eternity" in evidentiary terms, because of the watch's small size and moveable nature. Tr. 214, ll. 19 – 20.

The fact that police received the watch from a third party, Terri Johnson, who spent some time with Appellant, did not prove any of the elements of the above-referenced charges against Appellant. The state did not connect Appellant to the watch. The state wanted the jury to surmise Appellant gave Johnson the watch, where there was no nexus connecting Appellant to the watch and where Johnson never testified nor gave police any information on how she came into possession of the watch. The state could only show that Appellant may have shared a hotel room with Terri Johnson, and that Johnson gave the watch to law enforcement **twelve** days after the robbery. There is no evidence on the record as to whom Johnson received the watch from, nor is there evidence as to how long after the incident Johnson came into possession of the watch.

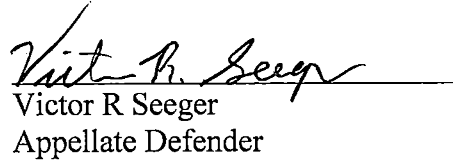
This is not a usual situation, where police got a warrant, searched the Days Inn hotel room, and found the missing watch there. Terri Johnson did not testify or tell police where she

got the watch from. Therefore, there was no sufficient nexus to lay the foundation to connect Appellant to the watch.

In this case, the state attempted to pile inference upon inference to manipulate the jury into thinking that there was a nexus connecting the watch and Appellant. The watch was not relevant to the charges of kidnapping, burglary, armed robbery, and possession of weapon during commission of a violent crime, and if it was relevant, the watch's probative value was substantially outweighed by its unfair prejudice to Appellant. Rule 403, SCRE. The probative value of the watch was minimal because without any evidence that Johnson received the watch from Appellant, the evidentiary predicate necessary for admission was missing; therefore, whatever probative value the watch had was outweighed by undue prejudice to Appellant. Moreover, the risk of the jury being misled to improperly convict Appellant based on his association with a third party who possessed the missing watch, was great. Therefore, the trial court erred when it overruled defense counsel's objections, admitted the watch, and admitted Officer Clark's testimony about the watch, into evidence, and that error prejudiced Appellant.

CONCLUSION

By reason of the foregoing arguments, Petitioner respectfully requests that this Court reverse the charges against him and remand the case for a new trial.



Victor R Seeger
Appellate Defender

ATTORNEY FOR APPELLANT

This 20th day of July, 2018.

STATE OF SOUTH CAROLINA

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THE STATE,

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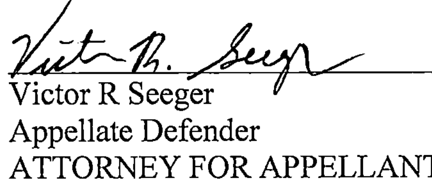
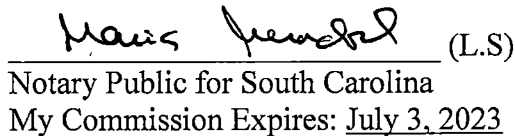
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial 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 Initial Brief of Appellant and Designation of Matter have been served on Donald Scott Robertson, #284226, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 20th day of July, 2018.



Victor R Seeger
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 20th day of July, 2018.


(L.S)

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