THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Laurens County

Donald B. Hocker, Circuit Court Judge

THE STATE,

Respondent,

v.

ARTHUR LEE WILLIAMS, III,

Appellant.

APPELLATE CASE NO 2018-000982

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in denying Appellant's motion to remove or strike the videotape of the drug buy after the State's main witness, who was the confidential informant in the case, contradicted himself on the stand and showed signs he was incompetent to testify?

STATEMENT OF THE CASE

In 2015, the Laurens County Grand Jury indicted Arthur Lee Williams, III (Appellant) for distribution of crack cocaine, indictment #2015-GS-30-1488. On May 24–25, 2018, Appellant proceeded to a jury trial before the Honorable Donald B. Hocker. Ivan J. Toney represented Appellant at trial. Deputy Solicitor Dale Scott and Assistant Solicitor Margaret Boykin prosecuted the case. The jury returned a verdict of guilty, and Judge Hocker sentenced Appellant to twenty-five (25) years' imprisonment. On May 29, 2018, Appellant filed a Notice of Appeal. This appeal follows.

STANDARD OF REVIEW

In criminal cases, an appellate court sits to review only errors of law. *State v. Anderson*, 407 S.C. 278, 285, 754 S.E.2d 905, 908 (Ct. App. 2014) (citing *State v. McEachern,* 399 S.C. 125, 135, 731 S.E.2d 604, 608 (Ct.App.2012). "'The admission or exclusion of evidence is left to the sound discretion of the trial [court], whose decision will not be reversed on appeal absent an abuse of discretion.'" *Id.* (quoting *State v. Black,* 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012). "'An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support.'" *Id.* (quoting *State v. Jennings,* 394 S.C. 473, 477–78, 716 S.E.2d 91, 93 (2011)).

ARGUMENT

The trial court erred in denying Appellant's motion to remove or strike the videotape of the drug buy after the State's main witness, who was the confidential informant in the case, contradicted himself on the stand and showed signs he was incompetent to testify.

Relevant Facts

The State tried Appellant for distribution of crack cocaine. (Tr. 6, lines 1–23). The State's case was based on the videotape of a controlled drug buy orchestrated by law enforcement and involving a confidential informant by the name of Sammy Anderson. The State called Anderson as a witness and had him authenticate the videotape of the drug buy. (Tr. 79, lines 20–Tr. 90, line 16).

On cross-examination, defense counsel began by questioning Anderson about some injuries he had sustained to his head and eye from an attack with a hammer. (Tr. 96, line 13–Tr. 98, line 11). Defense counsel asked him how long he was in the hospital, and Anderson replied that he did not know. (Tr. 98, lines 14–25). Defense counsel tried asking whether he was there for a month or more than three months, and Anderson replied that he had no idea whatsoever. (Tr. 98, line 18–Tr. 99, line 2). Defense counsel then asked whether the incident had any effect on his memory, to which he replied that it did not. (Tr. 100, lines 5–7). When defense counsel tried to inquire into who came and visited him while he was in the hospital, Anderson said he did not know, and the State interjected that the defense was asking the same question and Anderson did not remember. (Tr. 100, line 8–Tr. 101, line 2). The trial judge asked the defense to "move on to something else." (Tr. 101, lines 3–4).

Next, defense counsel began questioning Anderson about his work as a confidential informant for the police. (Tr. 101, lines 7–10). He claimed not to know how many times he had worked for them, saying he could not remember. (Tr. 101, lines 9–11). Anderson seemed to get

frustrated by the questions, saying, "Oh, man. Come on. Get off my back, man." (Tr. 101, lines 14–18). At that point, the trial judge sent the jury out of the courtroom. (Tr. 101, lines 19–24). He then instructed the witness to answer the questions and offered him a break before continuing. (Tr. 102, lines 2–24). When the jurors were back in the courtroom, defense counsel continued his cross-examination, asking about Anderson's history of drug use and some of his criminal record. (Tr. 104, line 15–Tr. 105, line 25).

Defense counsel brought up the videotape and began asking questions about some drugs that could be seen on the table in the videotape. (Tr. 108, lines 1–10). When defense counsel asked Anderson about his hand in the videotape, Anderson denied that it was his hand that appeared. (Tr. 108, line 11–Tr. 110, line 11). The topic of whose hand was in the videotape came up again, and Anderson further denied it was his, at which point he also explained that he could not see. (Tr. 117, line 22–Tr. 118, line 7). He elaborated that he could see the screen where the videotape was played but could not see "paperwork." (Tr. 118, lines 8–24). Although he had told the solicitor he could see his initials on the CD of the videotape earlier, he now claimed he could not see the initials but that he knew they were there because he put them there. (Tr. 119, line 14120, line 6). Despite claiming he could not see out of either eye, Anderson was able to correctly identify the number of fingers defense counsel was holding up. (Tr. 121, line 8–Tr. 122, line 25).

When court reconvened the next morning, defense counsel moved to remove the videotape from evidence based on the fact that it was authenticated by Anderson, who he now knew or alleged was not competent to testify. (Tr. 139, lines 12–23). He stressed that he had no way of knowing Anderson was not competent and it was not disclosed to him prior to trial. (Tr. 139, line 21–Tr. 140, line 1). He pointed out that Anderson repeatedly testified that it was not

his hand in the videotape, so he was not in the videotape; he could not see, so he could not see the videotape or his own initials on the CD; he could not read English; and he had a memory that was almost "nonexistent." (Tr. 140, lines 2–14). Defense counsel then noted that during the State's redirect, the solicitor inserted commentary and on one occasion tried to stop Anderson from testifying by saying, "No, no, no, no." (Tr. 140, lines 15–20).

Defense counsel went on to say that Anderson's testimony was lacking in competence, honesty, or reliability. (Tr. 140, lines 21–24). Further, he argued the testimony was so prejudicial that it had fatally infected the trial such that it was unfair to both sides. (Tr. 142, line 20–Tr. 144, line 3). He requested that at the very least the trial judge should remove the videotape from evidence based on the lack of proper authentication. (Tr. 144, lines 4–11).

In response, the State characterized Anderson's testimony as a response to badgering and bullying by defense counsel. (Tr. 149, lines 13–22). The solicitor pointed out that Rule 601(a), SCRE, states that every person is competent unless the trial court determines otherwise. (Tr. 149, lines 8–12). He noted that Anderson was able to clearly walk through what happened on the day of the controlled buy and said he understood why the witness reacted badly when defense counsel began asking him about the attack and his injuries. (Tr. 150, lines 5–24).

While the trial judge agreed that Anderson's testimony was outside the norm, he found that it did not rise to the level of questioning his competency to the extent of granting a mistrial. (Tr. 151, lines 20–25; Tr. 152, line 23–Tr. 153, line 2). He found that Anderson was clear about being able to see the television monitor even though he was unclear about seeing his initials. (Tr. 152, lines 1–7). Furthermore, he felt that whether he could see the documents went to the weight of his testimony rather than to competency. (Tr. 152, lines 8–11). He found no

authenticity issue with the videotape because it was testified to by Officer Prather. (Tr. 152, lines 12–18). The judge denied both motions. (Tr. 153, lines 3–5).

Ultimately, the jury found Appellant guilty of distribution of crack cocaine and the judge sentenced him to twenty-five years' imprisonment. (Tr. 300, lines 2-5).

Discussion

In criminal cases, an appellate court sits to review only errors of law. *State v. Anderson*, 407 S.C. 278, 285, 754 S.E.2d 905, 908 (Ct. App. 2014) (citing *State v. McEachern*, 399 S.C. 125, 135, 731 S.E.2d 604, 608 (Ct.App.2012). "'The admission or exclusion of evidence is left to the sound discretion of the trial [court], whose decision will not be reversed on appeal absent an abuse of discretion.'" *Id.* (quoting *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012). "'An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support.'" *Id.* (quoting *State v. Jennings*, 394 S.C. 473, 477–78, 716 S.E.2d 91, 93 (2011)).

It is the duty of a trial judge to determine competency of a witness to testify and to make a careful examination of the witness upon timely motion of counsel that will reveal to the trial judge's satisfaction the witness's ability to give competent testimony. *State v. Pitts*, 256 S.C. 420, 429, 182 S.E.2d 738, 743 (1971). The *Pitts* Court quoted the applicable rule from *State v. Comstock*, 70 S.E.2d 648 (W. Va. 1952): "'The question of the competency of a witness is a question for the court, and not for the jury, and when a witness is offered in a criminal case, **and doubt is raised as to the competency of such witness, it is the duty of the court to determine that question upon a careful examination of the witness** as to age, capacity, and moral and legal accountability.'" *Id.* at 430, 182 S.E.2d at 743 (emphasis added). The Court noted in *Pitts* that while the appellant should have objected to the witness's competency before he was sworn, even if it was discovered after he

was sworn that he was incompetent, the appellant should have made the motion to strike his testimony from the record. *Id.* This Court emphasized competency of a witness is a question for the judge, not the jury. *Id.* While that case focused on the appellant not making a timely motion to object to the competency of the witness, the *Pitts* Court still provides guidance for what the role of the trial judge is when competency is raised. And it is clear the judge has a duty to examine a witness whose competency is questioned.

All witnesses are presumed competent to testify. Rule 601(a), SCRE. However, a witness will be disqualified if he is unable to express himself "concerning the matter as to be understood by the judge and jury . . . or is incapable of understanding the duty of a witness to tell the truth." Rule 601(b), SCRE. A proposed witness understands the duty to tell the truth. *State v. Green,* 267 S.C. 599, 606, 230 S.E.2d 618, 621 (1976). "As succinctly explained by the Pennsylvania Supreme Court, in order to be competent to testify, a witness must have the ability (1) to perceive the event with a substantial degree of accuracy, (2) remember it, (3) communicate about it intelligibly, and (4) be mindful of the duty to tell the truth under oath." *State v. Needs*, 333 S.C. 134, 143, 508 S.E.2d 857, 861 (1998), *holding modified by State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004), (citing *Commonwealth of Pennsylvania v. Goldblum,* 498 Pa. 455, 447 A.2d 234, 239 (Pa.1982)).

Anderson did not seem to understand the duty to tell the truth. He repeatedly contradicted himself while on the stand, changing his answers during cross-examination from what he had said on direct. While the State attributed this to defense counsel's "bullying," the fact remains that he changed his answers. Furthermore, Anderson called each of the four abilities outlined by the Court in *Needs* into doubt. He certainly seemed not to be able to perceive the events with a substantial degree of accuracy when he claimed not to be able to see;

he continually failed to remember things when asked; he failed to communicate intelligibly; and he did not display a mindfulness of telling the truth.

Here, the trial court abused its discretion in refusing to grant Appellant's motion to remove or strike the videotape evidence. The State's witness—who was the confidential informant in the case—blatantly contradicted himself and got so belligerent that he was yelling and had to be told by the judge to stop. (Tr. 79–132; Tr. 115, line 12). He refused to answer defense counsel's questions, despite being told by the judge numerous times that he had to answer the questions. (Tr. 102, lines 2–20; Tr. 109, lines 5–9; Tr. 114, lines 10–11; Tr. 115, lines 1–10; Tr. 116, lines 4–8; Tr. 118, lines 10–14). After initially visually identifying things that happened in the videotape of the controlled buy and his own initials on the CD of that buy, he then claimed he could not see. (Tr. 88, lines 20–24; Tr. 92–95; Tr. 118, line 6; Tr. 119, line 14–Tr. 120, line 11). At one point, after being told by the judge to give a "yes" or "no" answer, Anderson apparently began yelling, "Yes. Yes. Yes. Yes." while talking over the judge. (Tr. 115, lines 4–12). Anderson made inexplicable comments while being cross-examined, such as when asked where he carried drugs, he said, "In your pocket" to defense counsel. Defense counsel asked, "In my pocket?" and Anderson answered, "That's what I just said." (Tr. 115, lines 19–23). Similarly, when asked whose hand it was in the videotape if not his, Anderson answered, "I don't know. Maybe it's yours." (Tr. 117, line 22–Tr. 118, line 1).

When looked at in its entirety, Anderson's testimony was confusing at best, and completely unreliable and untrustworthy at worst. Had he simply been a regular witness, this may not have been particularly prejudicial to the case. But here, when Anderson was the confidential informant on whom the whole case depended, and the witness who got the videotape entered into evidence, his testimony was extremely prejudicial. As defense counsel pointed out

during his argument, the testimony could have even been prejudicial to the State. (Tr. 143, lines 10-19). Due to the unreliable nature of the witness who authenticated the videotape, with troublesome matters brought up such as whose arm was in the videotape and whether Anderson could even see, it is hard to imagine how the jury considered the videotape reliable at all. The judge should have struck the videotape from evidence and instructed the jury to not consider it.

In the judge's ruling denying Appellant's motions, he noted that he did not "see that there's an authenticity issue with the . . . video[tape]" because "I think it was testified to by Officer Prather" and it "was taken as soon as – or close to the time that Sammy Anderson got back into the officer's car." (Tr. 152, lines 12–18). However, the State introduced the videotape based on Anderson's authentication, not Officer Prather's.

Rule 901(a), SCRE, requires "authentication or identification as a condition precedent to" the admissibility of evidence. This requirement "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Rule 901(a), SCRE. Under Rule 901(b)(1), authentication can be accomplished by testimony from someone familiar with and with knowledge of the contents of the document or recording. Authentication can therefore be accomplished through someone with knowledge of the events depicted on a videotape. *See State v. Brown*, 424 S.C. 479, 488, 818 S.E.2d 735, 740 (2018) ("It is black letter law that evidence must be authenticated or identified in order to be admissible."); *see State v. Campbell*, 259 S.C. 339, 344, 191 S.E.2d 770, 773 (1972) ("Normally it is sufficient to justify admittance of photographs into evidence if a person familiar with the scene can say that the pictures truly represent the scene involved.").

While the judge was correct that Officer Prather did testify that he recognized the videotape and testified to what it showed, the State did not admit that evidence through his

testimony. Instead, the State chose to use Anderson to admit the videotape. Thus, the fact that Anderson then became an unreliable witness tainted the admission of the videotape.

Appellant argued for either the removal of the videotape from evidence or a mistrial, neither of which the trial judge granted. At the very least, the trial judge should have determined the competency of the witness after defense counsel brought it to his attention. That was the trial judge's duty according to *State v. Pitts*. Here, however, the judge simply based his decision not to question Anderson's competency on the basis that some of what he said could have supported his being able to see the television monitor when the videotape was played. (Tr. 152, line 1–Tr. 153, line 5). Moreover, because he mistakenly believed Officer Prather's testimony was sufficient to admit the videotape of the controlled buy, the judge did not explore the issue any further. This was error. The judge had a duty to make a careful examination of the witness upon timely motion of counsel. *Pitts,* 256 S.C. at 429, 182 S.E.2d at 743. Because doubt was raised as to the competency of this witness, it was "the duty of the court to determine that question upon a careful examination of the witness as to age, capacity, and moral and legal accountability." *Id.* at 430, 182 S.E.2d at 743.

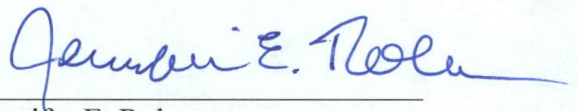
Rather than ruling that even though Anderson "testified . . . and acted in a way and . . . displayed a manner very unusual and not what we're accustomed to seeing, that in and of itself would not rise to the level of me questioning his competency to the extent of granting a mistrial," the trial judge had a duty to question the witness's competency once defense counsel brought it to the trial judge's attention. (Tr. 152, line 23–Tr. 153, line 2). Not questioning Anderson's competency was error.

As Rule 601(a), SCRE, points out, a witness will be disqualified if the court determines he is "incapable of expressing himself concerning the matter as to be understood by the judge and jury

either directly or through interpretation by one who can understand him, or (2) the proposed witness is incapable of understanding the duty of a witness to tell the truth." The trial judge here did not make that determination despite obvious signs that Anderson did not express himself in an understandable manner nor understand his duty to tell the truth.

CONCLUSION

Based on the above arguments, Appellant's conviction and sentence should be reversed.



Jennifer E. Roberts
Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of February, 2019.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Laurens County
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THE STATE,

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v.

ARTHUR LEE WILLIAMS, III,

Appellant.

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 Arthur Lee Williams, III, #344402, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 13th day of February, 2019.

Jennifer E. Roberts
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 13th day of February, 2019.

(L.S.)
Notary Public for South Carolina
My Commission Expires: May 12, 2027