

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable Edward W. Miller, Circuit Court Judge
Appellate Case Tracking No. 2011-196686

The State,

Respondent,

vs.

Kenneth S. Bolden,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. The trial court properly admitted the videotape after finding it was not unduly prejudicial under Rule 403, SCRE.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

ARGUMENT

I. The trial court properly admitted the videotape after finding it was not unduly prejudicial under Rule 403, SCRE.

Appellant contends the trial court erred in admitting a videotape from one of the officer's patrol cars when Appellant was picked up leaving the scene of the crime. The videotape is not overly prejudicial and provided the jury with the scene and location of the crime. Any error in its admission was entirely harmless in light of the evidence in the record.

The admission of evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). An abuse of discretion occurs when the trial court's conclusions either lack evidentiary support or are controlled by an error of law. Id. As this Court has stated :

We review a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment. A trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence.

State v. Lyles, 379 S.C. 328, 339, 665 S.E.2d 201, 207 (Ct. App. 2008) (internal citations omitted).

“‘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.” See e.g., In re Care and Treatment of Corley, 353 S.C. 202, 205, 577 S.E.2d 451, 453 (2003). “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).

According to Rule 402, SCRE: “All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible.” Further, Rule 403, SCRE, states: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice”

“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 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)); see also, State v. Dickerson, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000); United States v. Rodriguez-Estrada, 877 F.2d 153, 156 (1st Cir.1989) (“[A]ll evidence is meant to be prejudicial; it is only unfair prejudice which must be avoided.”); Lyles, 379 S.C. at 338, 665 S.E.2d at 206 (“Unfair prejudice means an undue tendency to suggest a decision on an improper basis.”).

In the instant case, the trial court correctly found the officers’ discussions and comments recorded on the videotape were not unfairly prejudicial to Appellant. The videotape provided a reference for the jury to see the scene where the autobreaking

occurred, which demonstrated the lack of accident or mistake by Appellant in entering the victims' vehicle. It corroborated the testimony of the victims that the car was parked right under a street light and demonstrated that the car would be easily visible to determine someone was inside. (State's Exhibit 3).

Further, Appellant is clearly heard lying to police about his name and birthdate, and instead, providing his brother's information. One officer even asks Appellant if he is being truthful in the identification he provided, and Appellant again gives his brother's information. (State's Exhibit 3). The videotape is highly probative because the jury can hear just how easily Appellant can lie, even when directly confronted by an officer for the truth. His deceit demonstrates a lack of credibility and honesty which can certainly be considered by the jury.

Any prejudice is *de minimis*, does not substantially outweigh the probative value of the video, and certainly is not so prejudicial that the jury was swayed or its decision was founded on an improper basis. Appellant complains of the "editorializing" by the officers. There are very few remarks made by the officers that could be characterized as "editorializing" and the ones you can hear only indicate they do not believe Appellant's story. (State's Exhibit 3). The fact they did not believe him would be evident to the jury by virtue of the fact he was arrested. As a result, the indication by the officers that they do not believe Appellant cannot possibly be prejudicial to Appellant.

Additionally, any error in admitting the video is entirely harmless. "The key factor for determining whether a trial error constitutes reversible error is 'whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" State v. Tapp, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012)

(citations omitted). “An error is harmless if the defendant’s guilt has been conclusively proven by competent evidence, such that no other result could have been reached.” State v. Johnson, 363 S.C. 53, 60, 609 S.E.2d 520, 524 (2005). Further, the admission of improper evidence is harmless where the evidence is merely cumulative to other evidence. State v. Haselden, 353 S.C. 190, 197, 577 S.E.2d 445, 448-49 (2003); see also, State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993) (any error in admission of evidence cumulative to other unobjected-to evidence is harmless).

Appellant’s guilt was proven by overwhelming evidence. He was clearly in the victims’ vehicle, rummaging through the console without permission. (T.58; 65-66; 70; R. 11; 18-19; 23). His story of looking for keys lacks any credibility because he was a significant distance away from where he claimed to have come from in search of the keys. (T.109-110; R. 47-48). One victim testified there were no other vehicles similar to his in the area so it is not possible for Appellant to have mistaken the vehicle for his friend’s. (T.64; 72; R. 17; 25). Finally, he lied about his identification to officers and his real identification was only discovered when his ID was found in his shoe upon his booking. (T.92; 97-98; 106-107; R. 37; 42-43; 44-45).

Also, the video was cumulative. The video did nothing more than show several people repeating the same information provided at trial, including Appellant’s claim he was merely looking for keys. The video was cumulative to the other testimony and certainly was not such that it affected the outcome of the trial. Accordingly, the trial court did not err in admitting the videotape, and even if admitted in error it was entirely harmless.

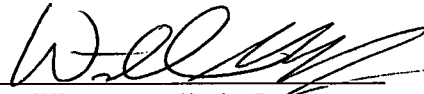
CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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February 25, 2013

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.
This 25th day of February, 2013.

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