STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dorchester County

Honorable Maite Murphy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RALPH JOEL BURNS,

APPELLANT

APPELLATE CASE NO 2017-002345

ANDERS BRIEF OF APPELLANT

KATHRINE H. HUDGINS
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STATEMENT OF ISSUE ON APPEAL

In this grand larceny trial did the trial judge err in refusing to suppress a small portion of a surveillance video when one school resource officer viewed the entire surveillance video from the time frame in question but only saved the portion of the video showing Appellant entering and leaving the data room where the stolen equipment was being stored?

STATEMENT OF THE CASE

In May of 2016, the Dorchester County Grand Jury indicted Appellant, Ralph Joel Burns, for grand larceny, indictment #2016-GS-18-0550. On November 7, 2017, Appellant proceeded to jury trial before the Honorable Maite Murphy. John M. Loy represented Appellant at trial. Glenn P. Smith and George B. Smythe prosecuted the case. The jury found Appellant guilty and Judge Murphy sentenced Appellant to three (3) years in prison. A timely notice of intent to appeal was served on November 9, 2017. This appeal follows.

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

In this grand larceny trial the trial judge erred in refusing to suppress a small portion of a surveillance footage when one school resource officer viewed the entire surveillance footage from the time frame in question but only saved the portion of the footage showing Appellant entering and leaving the data room where the stolen equipment was being stored.

Appellant worked as a groundskeeper at River Oaks Elementary School. (R. p. 73, line 21 – p. 74, lines 1-2). On February 18, 2016, the school received a shipment of iPads. (R. p. 76, lines 12-14). The principal of the school, Scott Mathews, testified that the financial secretary at the school received the iPads and stored them in a data room near the media center. (R. p. 64, line 10 – p. 65, lines 1-7). The principal testified that the data room was locked but it was unclear how many people may have had access to a master key that would unlock the room. (R. p. 69, lines 3-7; p. 67, lines 5-17; p. 117, line 24 – p. 118, lines 1-14). Kelvin Cooper, a floor tech at the school, testified that he had a master key that would unlock the data room and claimed he opened the room for Appellant. (R. p. 115, lines 13-16).

On March 2, 2016, the principal discovered that two boxes of iPads were missing from the data room. (R. p. 80, lines 14-17; p. 72, lines 8-9). The principal notified the school resource officer, James Parker, with the North Charleston Police Department. (R. p. 72, lines 10-12). The officer reviewed surveillance footage capturing the entrance to the data room from February 18, 2016, when the iPads were stored in the room to March 2, 2016, when the principal learned that some of the iPads were missing. (R. p. 89, lines 8-16). The officer testified that the video showed Appellant and Kelvin Cooper entering the room once and later showed Appellant entering the room two more times. (R. p. 89, line 23 – p. 90, lines 1-20). The officer testified that the third time Appellant entered the room he went in and came out with a trashcan. (R. p. 91, lines 4-10). According to the officer, when Appellant left the room the bag lining the trashcan

was pulled out halfway, like it was weighed down with something. (R. p. 91, lines 9-10). At that point the school resource officer contacted his supervisor at the North Charleston Police Department who turned the case over to the detective division. (R. p. 92, lines 1-4). According to the officer, a Detective Lizarrozo asked him to preserve only that part of the surveillance footage showing Appellant going into the data room three times. (R. p. 92, line 18 – p. 93, lines 1-3). The officer admitted that he did not preserve the remainder of the surveillance footage from February 18, 2016, to March 2, 2016. (R. p. 93, lines 4-10).

Prior to trial Appellant moved to suppress the portion of the surveillance footage that was preserved based on the fact that law enforcement failed to preserve all of the surveillance footage. (R. pp. 25 – 35; pp. 41 - 44). The judge denied the motion to suppress stating, "It was not – it does not appear at this juncture this – unless we hear the – the officer testify during the trial that it was intentionally spoliation of evidence, it appears that it was just the investigatory judgment call at that juncture, which you are free to cross-examine him on and present that to the jury. So your motion is respectfully denied." (R. p. 45, lines 11-17). The judge further explained her ruling citing State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001) and Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988). (R. p. 61, line 6 – p. 62, lines 1-2). During the trial the judge admitted as State's Exhibit #8 the small portion of the surveillance footage that was preserved. The judge erred in refusing to suppress the incomplete surveillance footage.

In State v. Hutton, 358 S.C. 622, 631, 595 S.E.2d 876, 881 (Ct. App. 2004), the South Carolina Court of Appeals wrote:

> Pursuant to the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). This standard requires criminal defendants be afforded a meaningful

> opportunity to present a complete defense. Id. The State does not, however, have an absolute duty to preserve potentially useful evidence that might exonerate a defendant. State v. Cheeseboro, 346 S.C. 526, 538, 552 S.E.2d 300, 307 (2001). Furthermore, "[w]hatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense." Trombetta, 467 U.S. at 488, 104 S.Ct. 2528. To establish a due process violation where the State fails to preserve evidence, a defendant must demonstrate (1) that the State destroyed the evidence in bad faith, or (2) that the evidence possessed an exculpatory value apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means. Cheeseboro, 346 S.C. at 538, 552 S.E.2d at 307.

In State v. Cheeseboro, 346 S.C. 526, 538-39, 552 S.E.2d 300, 307 (2001), the South Carolina Supreme Court wrote:

> The State does not have an absolute duty to preserve potentially useful evidence that might exonerate a defendant. Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988); State v. Mabe, 306 S.C. 355, 412 S.E.2d 386 (1991); State v. Jackson, 302 S.C. 313, 396 S.E.2d 101 (1990). To establish a due process violation, a defendant must demonstrate (1) that the State destroyed the evidence in bad faith, or (2) that the evidence possessed an exculpatory value apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means. State v. Mabe, supra; State v. Jackson, supra.

In the present case the prosecutor appears to acknowledge that the missing portion of the video possessed exculpatory value stating, "You know, I will acknowledge, obviously, I would prefer that I have the entire eight days, nine days, ten days – whatever it is – so that everyone can look at it –and – and -- and make their own judgment whether other people went in there." The officer admitted that, to his knowledge, he was the only person to view the entire surveillance video from the time in question before the footage was destroyed. (R. p. 109, lines 5-8). Appellant was unable to obtain other evidence of comparable value by other means. Under the second prong discussed in Cheeseboro, Appellant established a due process violation. The judge erred in refusing to suppress the incomplete surveillance footage.

CONCLUSION

Based on the above argument, this Court should reverse the conviction and sentence and remand the case for a new trial.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 30th day of July, 2018.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Ralph Joel Burns states:

1. She is 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 Maite Murphy, which was held on November 7 & 8, 2017, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. She 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, She asks the Court to relieve her as counsel for Ralph Joel Burns.

Respectfully Submitted,

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR APPELLANT

This 30th 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:

(1) True-billed indictment(s):
(2) Sentencing sheet
(3) Trial Transcript dated November 7-8, 2017
(4) State's Exhibit #8 - Flash drive video - to be transported

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

July 30, 2018

Kathrine H. Hudgins
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

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."

July 30, 2018.

Kathrine H. Hudgins
Appellate Defender

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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 Ralph Joel Burns, 374521, at Manning Correctional Institution, 502 Beckman Drive, Columbia, SC 29203, this 30th day of July, 2018.

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 30th day of July, 2018.

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