STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County

Honorable R. Markley Dennis, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RIAS ODELL ISAAC,

APPELLANT.

APPELLATE CASE NO. 2019-000303

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in allowing appellant's ex-fiancé, who received a $200 reward from Crimestoppers, to testify that she was able to identify appellant as the perpetrator of an armed robbery based on a picture she saw in Mugshot Magazine which was never entered into evidence by the State in violation of the best evidence rule?

STATEMENT OF THE CASE

Appellant was indicted in Berkeley County for armed robbery, kidnapping, and a weapons charge. R. 229. On February 11, 2019, appellant was tried before the Honorable R. Markley Dennis and a jury. R. 1. Bart Stegall and Wilton McNeely represented the State and Grant Smaldone represented appellant. R. 2. The jury convicted appellant and pursuant to South Carolina's recidivist statute, Judge Dennis sentenced appellant to life imprisonment without the possibility of parole. R. 217, l. 23 – 227, l. 21. 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

The trial court erred in allowing appellant's ex-fiancé, who received a $200 reward from Crimestoppers, to testify that she was able to identify appellant as the perpetrator of an armed robbery based on a picture she saw in Mugshot Magazine which was never entered into evidence by the State in violation of the best evidence rule.

The State's contention that appellant robbed a convenience store rested almost solely on the identification of two witnesses. The State recovered no usable DNA evidence. R. 90, l. 23 – 91, l. 1. The State recovered no usable fingerprints. R. 91, ll. 10 – 11. A search of appellant's residence only recovered a pair of ubiquitous tan boots that resembled the tan boots worn by the robber. R. 140, l. 14 – 141, l. 8. The search did not recover a jacket, gun, money, or cigarettes that would have matched the robbery. R. 145, l. 17 – 146, l. 19.

The clerk from the convenience store made an in-court identification of appellant as the robber. R. 67, l. 21 – 68, l. 3. She also picked appellant out of a lineup a week after the robbery. R. 61, l. 1 – 66, l. 23. While the clerk said she was "100 percent" certain that appellant was the robber, she described her selection of him on the lineup form as "almost certain." R. 66, ll. 13 – 23.

The clerk testified that after opening the store around 5:30 AM, she was stocking the lottery tickets when a man entered. R. 45, l. 13 – 49, l. 25. The man asked her for two packs of Newport cigarettes. R. 49, ll. 1 – 25. When she went behind the counter to get the cigarettes, the man was behind her with a gun demanding money. R. 49, ll. 1 – 25. He also demanded the quarters from the register. R. 49, ll. 1 – 25. He also took Maverick Menthol cigarettes. R. 51, ll. 14 – 20. After getting the money, the robber took the clerk behind the store and told her not to

look at him. R. 49, ll. 1 – 25. The robber then fled on foot. R. 49, ll. 1 – 25. R. 81, l. 7 – 82, l. 3. The clerk hit the panic button and called the police and her boss. R. 53, ll. 19 – 22.

The store's surveillance video was entered into evidence along with stills captured from it. State's Ex. 3-14, 21. The video in evidence is of poor quality. State's Ex. 21. However, the detail is sufficient to reveal mistakes the clerk made when she gave her description of the robber to the police on the 911 call and immediately after the robbery. R. 75, l. 4 – 79, l. 5. She initially told the police the robber had on a hoodie, but the robber only wore a Gamecock windbreaker. R. 75, l. 4 – 79, l. 5. She told police the man wore black boots, but the robbery wore tan boots. R. 75, l. 4 – 79, l. 5. She did not describe any facial features nor mention a distinctive scar on appellant's face. R. 75, l. 4 – 79, l. 5. R. 123, ll. 7 – 17. Nor did the clerk mention that the robber had an accent. R. 79, l. 16 – 18. Appellant is from Brooklyn and has a distinctive New York accent. R. 123, l. 18 – 124, l. 10.

The other witness who identified appellant as the robber was his ex-fiancé, Sandra Hawkins. R. 108, ll. 2 – 12. The solicitor seemed surprised that Hawkins had a job at U-Haul, asking her if they'd done a background check. R. 107, ll. 5 – 11. When asked on direct if she'd ever been convicted of a crime, she replied that she had been convicted for shoplifting and the "last one was 2013." R. 107, ll. 12 – 18. On cross, defense counsel elicited that Hawkins had first been convicted of shoplifting in 1985 and then in 1990, of shoplifting, sixth offense in 1993, again in 1997, 1998, 2003, and 2006. R. 115, l. 16 – 116, l. 20.

Hawkins and appellant broke up in 2013 (the robbery was December 31, 2014). R. 109, ll. 18 – 19. R. 45, ll. 17 – 18. She testified on direct that she had seen a photograph of appellant's face "in the press" and called the police. R. 111, l. 13 – 114, l. 19. She told the jury on direct that was testifying "[j]ust to get the truth to be told." R. 114, ll. 13 – 19.

In addition to getting the truth told, Hawkins admitted on cross-examination that she also got $200 from Crimestoppers for reporting her ex-fiancé. R. 121, l. 18 – 122, l. 12. She agreed that once she called Crimestoppers, she could not change her story because that would be a crime and she did not "need any more of those." R. 122, ll. 3 – 12.

Defense counsel asked if she saw appellant's photograph on the news and Hawkins replied, "I seen it in Mugshot Magazine." R. 116, ll. 24 – 25. She claimed she recognized appellant's face in the picture in Mugshot Magazine. R. 117, ll. 1 – 7. But Hawkins admitted she could not recognize appellant's face in any of the eleven photographs the State entered into evidence at the trial. R. 117, ll. 8 – 14. State's Ex. 3-14. Given an opportunity to look at the State's photographs, she agreed appellant did not look like the robber. R. 122, l. 13 – 125, l. 11.

On redirect, the solicitor clarified that the picture she saw in "the press release" was not the picture in evidence. R. 126, ll. 8 – 15. The "press release" photograph was of the robbery. R. 126, ll. 16 – 18. The solicitor showed her several photographs and attempted to ask whether the still photos from the surveillance video which were used at trial were "harder to see his appearance" and that the press release photograph "was a different picture and you could see his—" at which point defense counsel objected. R. 126, l. 19 – 127, l. 19. Judge Dennis asked for the basis and appellant replied, "Best evidence." R. 127, ll. 18 – 21.

The court overruled the objections and allowed the solicitor to continue questioning Hawkins about the press release photograph. R. 127, ll. 22 – 25. The solicitor asked whether the press release photograph was "more detailed than what I'm showing you" and Hawkins replied, "It was a lot clearer. These are very blurry." R. 128, l. 22 – 129, l. 1. Looking at the photographs the State used at trial, Hawkins could not see the robber's face and said the pictures were dark, R. 129, ll. 2 – 13. The solicitor then asked:

Q. Could you see the person's face on the press release?

A. Yes.

Q. And were you able to 100 percent identify him?

A. Yes, I could.

Q. And who was he?

A. Rias Isaac.

R. 129, ll. 14 – 21. On re-cross, defense counsel confirmed that Hawkins had not seen the press release at all in the courtroom, and this assertion went unchallenged by the solicitor. R. 130, ll. 2 – 7.

In his closing argument, the solicitor admitted that appellant could not be identified from the photos entered into evidence at trial. R. 172, ll. 19 – 21. He said, "I can't tell if that's his face. It's blurry. Nobody can tell." R. 172, ll. 19 – 21. But earlier in his argument, the solicitor told the jury, "We also know that [Hawkins] saw a press release with a clear photo of the defendant. She testified, when I said, are you sure that's him, 100 percent. Those were her words, 100 percent." R. 171, ll. 16 – 19.

The trial court erred in allowing Hawkins to testify about a photograph that was not introduced at trial nor its absence ever explained by the State. Admission of Hawkins' testimony identifying appellant from a missing "press release" photograph was improper under the best evidence rule. See Rules 1001-1004, SCRE. "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." Rule 1002, SCRE.

Hawkins' testimony did not meet the best evidence rule's exceptions. Rule 1004, SCRE. Rule 1004 sets forth when the original photograph is not required and "other evidence of the contents" is admissible. Id. Other evidence is allowed only when (1) the originals were lost or destroyed and not in bad faith; (2) the original could not be obtained by any available judicial

procedure; (3) the original was under the opposing party's control; or (4) the photograph involved a collateral matter. Rule 1004, SCRE.

The third and fourth exception do not apply to this photograph. The robber would not have been in possession of the clear photo from the incident. The photograph related to the central issue in the case: identification. Judicial process could have obtained the photograph from Mugshots Magazine and the second exception from Rule 1004 could not be met.

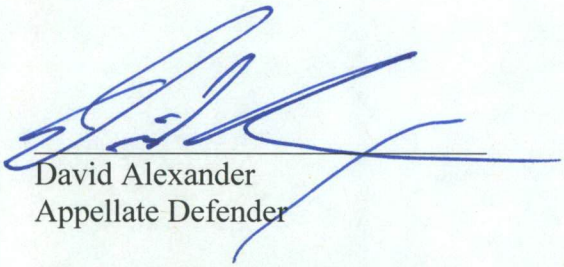
The solicitor was the first to call the photograph Hawkins allegedly saw a "press release." R. 126, ll. 11 – 18. The most logical inference from this statement is that it was a press release from the police. Hawkins identified Mugshots Magazine as where she saw the photograph. If it was a press release from the police, it was in the State's possession. The State offered no explanation for why this clearer picture was not offered at trial nor from where the clearer picture was obtained. The State never even claimed the original picture was lost or destroyed. The State offered no explanation whatsoever if the picture existed, what happened to the "press release" or where such a photograph might currently be. Therefore the first exception is not met.

The State will likely claim that appellant has not shown bad faith under State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001) or Arizona v. Youngblood, 488 U.S. 51 (1988). However, this line of analysis is only when the State's evidence satisfies the first part of Rule 1004(1)—that the original was "lost or destroyed." The State was the proponent of this evidence. The State made no showing that the original was lost or destroyed. This showing by the State—that the original **in fact existed in the first place** and then was lost or destroyed—must be made before imposing the onerous bad faith requirement on the criminal defendant. The purpose of the best evidence rule is to prohibit a less than savory witness like Hawkins from testifying about the contents of a document that may or may not have existed.

The State did not use Hawkins to explain how the police obtained appellant's name and picture for the lineup. Instead of explaining appellant's appearance in the lineup given to the clerk as a tip or some other innocuous mention, the solicitor repeatedly emphasized that Hawkins was "100 percent" sure the so-called clear photo of the incident she saw was appellant. Hawkins, a serial shoplifter, made $200 for her claim to Crimestoppers, but nothing was offered to support her claim. The solicitor admitted the pictures used at trial were useless for identifying the robber. The clerk's identification contained serious discrepancies. Hawkins' testimony was inadmissible under the best evidence rule and this case must be reversed.

CONCLUSION

For the foregoing reasons, appellant's convictions should be reversed and remanded for a new trial.



This 13th day of March, 2020.

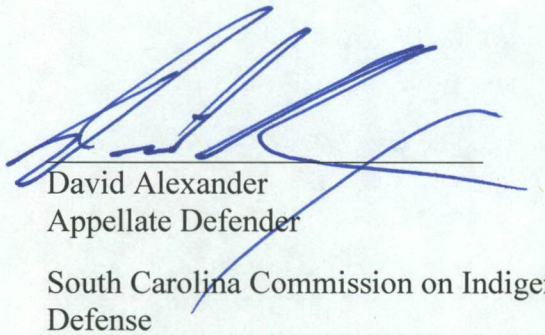
David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final 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."

March 13, 2020.



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