

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Anderson County

Honorable J. Cordell Maddox, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAMORIUS DONTAVIS GAINES,

APPELLANT

APPELLATE CASE NO. 2018-001672

ANDERS BRIEF OF APPELLANT

LARA M. CAUDY
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

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge abuse his discretion by admitting opinion testimony from Appellant's mother and his ex-girlfriend concerning the identity of the suspect caught on surveillance footage from the attempted armed robbery in violation of Rule 701, SCRE, since their identifications (1) were not rationally based on their perceptions and (2) were not helpful to a clear understanding of the determination of a fact in issue, rather the testimony likely confused the jury?

STATEMENT OF THE CASE

An Anderson County grand jury indicted Appellant on July 18, 2017 for kidnapping, attempted armed robbery, armed robbery, and two counts of possession of a weapon during the commission of a violent crime. R. 350-355. His case was called to trial on September 4, 2018 before the Honorable J. Cordell Maddox, and a jury. R. 1. Assistant Solicitors Stan Overby and Catherine Huey represented the state, and Hadden Lucas and Gordon Senerius represented Appellant. R. 1.

On September 6, 2018, the jury found Appellant guilty as indicted. R. 338, l. 8 – 339, l. 16. He was sentenced to twenty years suspended upon the service of fifteen years imprisonment and five years probation for both kidnapping and attempted armed robbery, fifteen years for armed robbery, and five years for each count of the weapons offense. All sentences were ordered to be served concurrently. R. 347, ll. 11-19.

This appeal follows.

STANDARD OF REVIEW

“The admission or exclusion of evidence is a matter within the trial court’s sound discretion, and an appellate court may only disturb a ruling admitting or excluding evidence upon a showing of a manifest abuse of discretion accompanied by probable prejudice.” State v. Westmoreland, 421 S.C. 410, 418-419, 807 S.E.2d 701, 706 (Ct. App. 2017) (citing State v. Commander, 396 S.C. 254, 262-263, 721 S.E.2d 413, 417 (2011)) (internal quotation marks omitted); See State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-848 (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. at 419, 807 S.E.2d at 706 (quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)) (internal quotation marks omitted).

STATEMENT OF FACTS

At approximately 7:40 pm on February 16, 2017, an armed and masked man wearing blue jeans, a black hooded sweatshirt, and black gloves attempted to enter the Little General, a convenience store in Anderson. While the store was open for business at the time, the front door was locked because the ATM inside the store was being refilled. R. 154, l. 4 – 155, l. 18; R. 163, ll. 18-22. After being unable to open the door, the man ran around to the back of the building and removed his mask. A surveillance camera on the outside of the building captured the man's face as he lifted his mask. R. 92, ll. 7-19.

About twenty minutes later at 8:03 pm, the same armed and masked man entered the nearby Dollar Tree store. R. 109, l. 5 – 110, l. 1. He approached the cashier, who was in the stock room located at the back of the store, put a gun in her face, and demanded she walk to the register and give him cash. R. 101, l. 4 – 102, l. 17; R. 110, ll. 15-21. After the cashier opened the register, the man filled his bag with cash and then fled out the front door. R. 102, l. 22 – 103, l. 11; R. 110, l. 24 – 111, l. 12. The manager of the store, who was in the office at the time, called 911 and reported the robbery. R. 104, ll. 8-16. The police arrived about ten minutes later. R. 104, ll. 17-24; R. 113, ll. 10-16.

The police used a K-9 to attempt to track the suspect. The K-9 tracked from the Dollar Tree to the Little General. R. 132, ll. 4-15; 134, l. 7 – 135, l. 8. However, law enforcement was unable to locate a suspect that night. R. 136, ll. 19-21. Officers obtained the surveillance footage of the robbery and attempted robbery from the Dollar Tree and the Little General respectively. R. 114, l. 4 – 115, l. 9; R. 160, ll. 7-23.

In the weeks that followed, law enforcement had no leads in the case. Investigator Craig Gardner with the Anderson City Police Department eventually received a tip from a confidential

informant. R. 200, ll. 12-16. Based on this tip, Gardner “pulled an incident report . . . involving a traffic stop” that occurred in the City of Anderson. R. 201, ll. 16-20; R. 235, l. 23 – 236, l. 15. He identified the two individuals involved in this traffic stop, Appellant and Marques Glover, and compared their photographs to the suspect on the surveillance footage. R. 200, l. 18 – 201, l. 23. Gardner immediately knew Glover was not the “subject of interest” based on his facial features and because he was much smaller and thinner than the suspect. R. 201, l. 24 – 202, l. 4. However, he believed Appellant may be the robber based on his physical characteristics and decided to investigate Appellant further. R. 202, ll. 5-9.

Gardner went to Appellant’s mother’s residence, which was “less than one-tenth of a mile” from the Dollar Tree, on March 9, 2017, and spoke to his mother, Connie Gaines. R. 202, l. 10 – 204, l. 21. Gardner told Ms. Gaines that he “wanted to talk about her son” and showed her a still image from the surveillance footage of the attempted armed robbery at the Little General. R. 204, l. 18 – 205, l. 13. According to Gardner, Ms. Gaines “shook her head in disgust and said, ‘I don’t know what’s got into him.’” R. 206, ll. 7-14.

Based on his conversation with Ms. Gaines, Investigator Gardner located Sherika Harper, who was incarcerated in the city jail. Harper “was said to be” Appellant’s girlfriend at the time. R. 213, ll. 13-24. Gardner went to the jail and had Harper “pulled so [he] could take her up to the investigations division and talk with her.” R. 214, ll. 2-5. He told Harper that she “wasn’t being charged with anything” and that he “just needed to talk with her about her relationship with” Appellant. R. 214, ll. 6-10. Gardner likewise showed Harper a still image from the surveillance footage. R. 215, ll. 4-20. He subsequently showed her the video footage from which the still image came. R. 216, ll. 16-19. Harper ultimately provided Gardner with a written statement. R. 215, ll. 19-20.

When Gardner was returning Harper to the jail, Harper asked Gardner if he “could see if the judge would help her out.” Gardner told her “that if [he] saw the judge, [he] would ask him.” R. 217, ll. 15-18. Conveniently, Gardner saw one of the judges as he was leaving the jail and told the judge of Harper’s cooperation. R. 217, l. 19 – 218, l. 1. Harper was later released that same day despite being incarcerated on a bench warrant for a pending trespassing charge. R. 217, ll. 10-12; R. 252, l. 7 – 253, l. 12.

After speaking with Harper, Gardner obtained warrants for Appellant and had them served on Appellant while he was incarcerated in the city jail. R. 218, l. 21 – 219, l. 6. After being served with the warrants, Appellant asked to speak with Gardner. During their conversation, Appellant denied any involvement in the attempted armed robbery of the Little General and the subsequent armed robbery of the Dollar Tree. Appellant stated, “Why would I rob a store across the street from my house or from where I lived.” R. 225, l. 23 – 226, l. 7. Appellant also allowed Gardner to take a couple of photographs of him. R. 226, l. 15 – 227, l. 18.

Sherika Harper testified that she dated Appellant for a few months around the time of the robbery. According to Harper, Appellant lived with his mother, but often spent the night at Harper’s house while the two were dating. Harper remembered speaking with Investigator Gardner on March 9, 2017. Gardner showed Harper a still image of the suspect from the surveillance footage. Harper told Gardner that the individual was “similar to” Appellant, but she could not tell from the picture if it was him because the picture was blurry. R. 167, l. 21 – 168, l. 25. Gardner then showed Harper the actual video of the surveillance footage. Harper denied telling Gardner, “Yep. That’s Damorius Gaines [Appellant] in the picture.” R. 169, ll. 9-16; R. 175, ll. 5-8. However, she admitted to providing a written statement to Gardner that read, “I,

Sherika Harper, was shown a picture and could not identify by picture but by video I could. The person in the video is Damorius Gaines.” R. 175, l. 9 – 176, l. 10.

Harper explained that she only stated the individual in the surveillance footage was Appellant because she wanted Appellant to stay in jail at the time. When she met with Gardner, she was angry with Appellant because the two had just broken up. Harper testified that the individual in the footage is not Appellant. R. 177, l. 22 – 178, l. 15. When asked by the solicitor, Harper was adamant that she was not afraid of Appellant and that the two broke up because they “had problems.” R. 178, l. 25 – 179, l. 25.

Connie Gaines, Appellant’s mother, testified that Investigator Gardner showed her a still image from the surveillance footage and that she “shook her head no” when she saw the picture because the picture was not of her son. R. 186, l. 12 – 187, l. 5. She denied saying, “I don’t know what’s gotten into that boy.” R. 184, l. 11 – 186, l. 4; R. 187, ll. 10-13.

The jury ultimately found Appellant guilty of the attempted armed robbery of the Little General, the armed robbery of the Dollar Tree, kidnapping, and possession of a weapon during the commission of a violent crime. R. 338, l. 8 – 339, l. 16.

ARGUMENT

The trial judge abused his discretion by admitting opinion testimony from Appellant's mother and his ex-girlfriend concerning the identity of the suspect caught on surveillance footage from the attempted armed robbery in violation of Rule 701, SCRE, since their identifications (1) were not rationally based on their perceptions and (2) were not helpful to a clear understanding of the determination of a fact in issue, rather the testimony likely confused the jury.

How the Issue was Presented Below

Appellant objected pretrial to any opinion testimony from Appellant's mother, Connie Gaines, and Appellant's ex-girlfriend, Sherika Harper, concerning the identification of the suspect caught on the surveillance footage from the Little General during the attempted armed robbery on February 16, 2017 pursuant to Rule 701, SCRE. R. 82, l. 16 – 83, l. 7. As far as Harper's prior identification, defense counsel argued that it was not based on her rational perception as required under Rule 701 because Harper merely claimed the suspect was Appellant "because she was mad at him and wanted him to stay in jail." R. 82, l. 16 – 83, l. 7. Counsel further argued that both Harper's prior identification and Ms. Gaines' alleged identification do not help to provide a clear understanding because both witnesses now say the suspect in the surveillance footage is not Appellant. R. 83, l. 13 – 84, l. 5. He asserted, "[T]hat doesn't help provide a clear understanding. That's clear as mud." R. 84, ll. 2-5.

In response, the assistant solicitor argued that while Harper now maintains the individual in the footage is not Appellant, she unequivocally stated the man was Appellant when she was questioned by Investigator Gardner in March of 2017. Harper memorialized her identification in a written statement in which she signed. Consequently, the solicitor asserted that if Harper changes her statement on the stand, the state would move to impeach her. R. 84, l. 7 – 85, l. 15.

Judge Maddox ultimately denied the motion to exclude the prior identifications allegedly made by Harper and Ms. Gaines pursuant to Rule 701, SCRE. The judge asserted that if the witness change their opinions on the stand, the state may impeach them with their prior inconsistent statements. He stated, "I think it's a factual issue that the jury has to determine whether or not their testimony is credible either then or now." R. 85, l. 16 – 86, l. 25.

Discussion

The trial judge abused his discretion by admitting opinion testimony from Connie Gaines, Appellant's mother, and Sherika Harper, his ex-girlfriend, concerning the identity of the suspect caught on surveillance footage from the attempted armed robbery at the Little General in violation of Rule 701, SCRE, since their identifications (1) were not rationally based on their perceptions and (2) were not helpful to a clear understanding of the determination of a fact in issue. Instead, testimony concerning their prior identifications likely confused the jury.

Rule 701, SCRE, states, "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training."

"Expert testimony differs from lay testimony in that an expert witness is permitted to state an opinion based on facts not within his firsthand knowledge . . ." State v. Westmoreland, 421 S.C. 410, 419, 807 S.E.2d 701, 706 (Ct. App. 2017) (quoting Watson v. Ford Motor Co., 389 S.C. 434, 445-446, 699 S.E.2d 169, 175 (2010)) (internal quotation marks omitted). "On the other hand, a lay witness may only testify as to matters within his personal knowledge and may not offer opinion testimony which requires special knowledge, skill, experience, or training." Id.

at 419, 807 S.E.2d at 706 (quoting Watson, 389 S.C. at 446, 699 S.E.2d, at 175)) (internal quotation marks omitted); see also State v. Douglas, 380 S.C. 499, 502, 671 S.E.2d 606, 608 (2009) (“Lay witnesses are permitted to offer testimony in the form of opinions or inferences if the opinions or inferences are rationally based on the witness’[s] perception, and will aid the jury in understanding testimony, and do not require special knowledge.”).

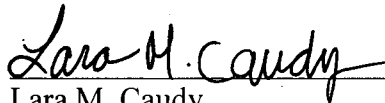
Here, the prior identification of Appellant made by Harper was not rationally based on her perception since Harper admitted she only identified the robber as Appellant because she was angry with him and wanted him to stay in jail. Moreover, her prior identification could only have confused the jury and therefore was not helpful to a clear understanding of her testimony or the determination of a fact in issue. As far as Connie Gaines, she also denied making any sort of identification of Appellant as the individual in the surveillance footage. She testified that when Investigator Gardner showed her the picture of the suspect, she shook her head because it was not Appellant. Therefore, her alleged prior identification also was not helpful to a clear understanding of her testimony or the determination of any fact in issue. Consequently, the trial judge abused his discretion by admitting this lay opinion testimony pursuant to Rule 701, SCRE.

Respectfully, this Court should reverse Appellant’s convictions and sentence and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his convictions and sentence and remand for a new trial.

Respectfully Submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 10th day of June, 2019.

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Honorable J. Cordell Maddox, Circuit Court Judge

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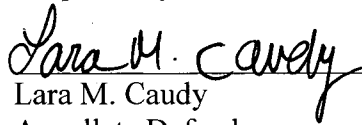
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Damorius Dontavis Gaines states:

1. She is an 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, which was held on September 4-6, 2018 before the Honorable J. Cordell Maddox, 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 Damorius Dontavis Gaines.

Respectfully Submitted,


Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 10th day of June, 2019.

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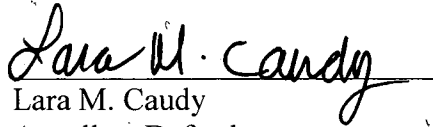
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) Complete Trial Transcript Dated September 4-6, 2018;
- (2) True-Billed Indictments;
- (3) Sentence Sheets.

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

June 10, 2019


Lara M. Caudy
Appellate Defender

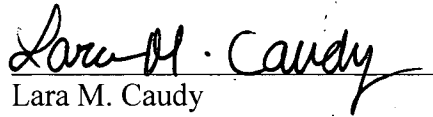
South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

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."

June 10, 2019.



Lara M. Caudy
Appellate Defender

South Carolina Commission on Indigent
Defense
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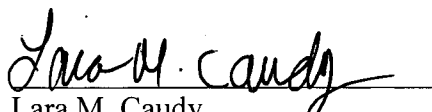
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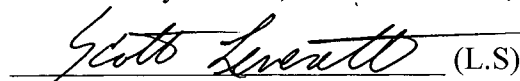
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant, Designation of Matter, and Record on Appeal in the above referenced case have been served upon William M. Blich, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant, Designation of Matter, and Record on Appeal have been served upon Damorius Dontavis Gaines, #346524, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 10th day of June, 2019.


Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 10th day of June, 2019.

 (L.S)
Notary Public for South Carolina
My Commission Expires: September 27, 2028.