

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Oct 26 2020
SC Court of Appeals

Appeal from Oconee County
R. Scott Sprouse, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DWAYNE EIGNER,

APPELLANT

APPELLATE CASE NO. 2020-000165

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in Appellant's trial for grand larceny (of a truck) where it admitted testimony that Appellant was recorded by a surveillance camera retrieving a key to the truck just before the truck was stolen, where the recording was not admitted at trial and had been destroyed, since Rule 1002, SCRE requires that the original recording be admitted in order to prove the contents of the recording?

STATEMENT OF THE CASE

On June 11, 2018, an Oconee County Grand Jury indicted Appellant for grand larceny. R. 170 – 171. Appellant was tried before the Honorable R. Scott Sprouse and a jury on January 29, 2020. R. 1; R. 29. Austin McLain represented Appellant. Jason Alderman represented the State. R. 1.

Appellant was convicted as indicted and he was sentenced to ten years' imprisonment suspended upon the service of two years of a home incarceration program and five years of probation. R. 160, ll. 9-14; R. 168, ll. 15-18.

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 Appellant’s trial for grand larceny (of a truck) where it admitted testimony that Appellant was recorded by a surveillance camera retrieving a key to the truck just before the truck was stolen, where the recording was not admitted at trial and had been destroyed, since Rule 1002, SCRE requires that the original recording be admitted in order to prove the contents of the recording.

The court should not have admitted testimony that Appellant was seen on a video recording taking the truck key where the recording had been destroyed. Rule 1002, SCRE required the original recording be admitted in order to prove the recording’s contents.

Relevant facts

On December 7, 2017, Kevin Jankowy (Jankowy), the finance manager at Scenic Chevrolet, reported that a 2018 Silverado 2500 “big diesel truck” (the truck) was missing from the dealership’s car lot. R. 75, l. 21 – 76, l. 2; R. 78, l. 7 – 80, l. 15; R. 67, ll. 14-23. Appellant had been a salesman at the Scenic Chevrolet dealership temporarily as part of an “event sale.” A couple of days after the sales event ended, Jankowy noticed the truck was missing. R. 76, l. 15 – 77, l. 16; R. 80, l. 13 – 81, l. 10.

Although another person actually took the truck, the State alleged that Appellant supplied the key to the truck thief, and thus, alleged that Appellant was guilty of grand larceny under the theory of accomplice liability. R. 72, ll. 6-15; R. 69, ll. 8-25; R. 155, l. 11 – 156, l. 22. Jankowy and two police officers claimed they knew Appellant took the key to the truck shortly before the truck was stolen because they saw him do so when they watched video surveillance footage which was recorded when Appellant opened the dealership’s “key machine.” R. 69, ll. 7-25; R. 82, l. 13 – 86, l. 18; R. 108, l. 8 – 109, l. 15.

However, this critical piece of evidence—alleged video footage of Appellant taking the truck key—was destroyed. R. 108, l. 18 – 111, l. 16. Officer McMahan said he asked Jankowy to make him a copy of all of the relevant surveillance videos, but that he later discovered the video footage in which Appellant allegedly took the key had not been copied. McMahan said when he went back to the dealership to request another copy, “they told me that the system is a 30-day system so it rewinds itself and clears everything out . . . [I] couldn’t retrieve it.” R. 109, l. 21 – 111, l. 16.

There was additional video surveillance footage which was recorded by other cameras and admitted at trial that showed Appellant do a “dance,” drive off and leave the dealership, and then return to the dealership. A passenger got out of a car that had been following Appellant on his return to the dealership, and the passenger exited and got into the truck, and drove off in the truck, stealing it. The car in which the passenger had arrived left as well. R. 85, l. 14 – 86, l. 18. The person who actually drove off in the truck was never identified. R. 70, ll. 16-22.

Pre-trial, defense counsel moved to suppress testimony about the contents of the unavailable video footage, noting that the defense had never even been able to view the footage. Defense counsel argued, “Law enforcement, evidently, didn’t preserve it, didn’t turn it over. Based on the best evidence rule, I would ask that the State not be allowed to elicit testimony describing the contents of that video.” R. 47, ll. 12-16. Defense counsel cited Rule 1002, SCRE, and *State v. Worthy*,¹ and asked that any testimony about that particular video recording (the “key machine” video recording) be suppressed. R. 47, l. 17 – 49, l. 10.

¹ *State v. Worthy*, 239 S.C. 449, 123 S.E.2d 835 (1962), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991).

The solicitor cited *State v. Halcomb*.² The Solicitor also claimed that since the video footage was destroyed by the car dealership instead of by law enforcement, the State, as proponent of the evidence, had not acted in bad faith and thus evidence about the contents of the footage should be admissible under Rule 1004, SCRE. R. 49, l. 21 – 51, l. 23.

Defense counsel argued that the evidence was destroyed in bad faith since police officers recovered “every video” “from the dealership except the one that is actually relevant to whether or not [Appellant] was involved with this . . . I do think that’s bad faith.” R. 52, ll. 3-12.

The trial court ruled the testimony admissible, finding that *Halcomb* was “on point.” “I will deny your motion in limine to the extent that the State may refer to anything that they referred to in the incident report that was provided; however, I’ll grant the motion in limine as to any matters that may be discussed beyond what was disclosed to you in the incident report in discovery.” R. 52, l. 18 – 53, l. 6.

Three witnesses (Jankowy and two police officers) then testified they saw video footage in which Appellant took the truck key shortly before the truck was stolen. R. 69, ll. 7-25; R. 84, ll. 18-25; R. 108, l. 8 – 109, l. 15. Appellant was convicted of grand larceny. R. 160, ll. 10-14.

Discussion

The State should not have been permitted to prove the contents of the “key machine” video footage through testimony, since the original video footage had been destroyed. Rules 1001 – 1004, SCRE are sometimes referred to as the “best evidence rule.” *Halcomb*, 382 S.C. at 443–44, 676 S.E.2d at 155. Rule 1002, SCRE provides: “To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as

² *State v. Halcomb*, 382 S.C. 432, 676 S.E.2d 149 (Ct. App. 2009).

otherwise provided in these rules or by statute.” The admission of testimony about the non-existing video footage therefore violated Rule 1002, SCRE.

Rule 1004, SCRE provides:

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if - (1) Originals Lost or Destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or (2) Original Not Obtainable. No original can be obtained by any available judicial process or procedure; or (3) Original in Possession of Opponent. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or (4) Collateral Matters. The writing, recording, or photograph is not closely related to a controlling issue.

Here, the exceptions provided in Rule 1004 do not apply since there was evidence the missing video was destroyed in bad faith. As defense counsel argued, law enforcement saved all of the relevant video footage except the footage that was most critical—alleged footage of Appellant taking the truck key shortly before the truck was stolen. Therefore, counsel correctly argued the original video recording was required pursuant to Rule 1002, SCRE. Testimony about the footage should not have been allowed and the trial court was, therefore, in error.³

In *State v. Worthy*, 239 S.C. at 460, 123 S.E.2d at 840, the South Carolina Supreme Court considered “whether oral testimony of the [defendant’s] confessions can be given where the evidence shows that tape recordings were made of such confessions.” The Supreme Court

³ Although defense counsel did not contemporaneously object when witnesses testified about the contents of the “key machine” video footage and Appellant recognizes this Court may find the issue one to be properly brought forth during post-conviction relief (PCR) proceedings instead of on direct appeal, Appellant submits that fundamental fairness weighs in favor of finding the issue preserved. *Contra State v. Sheppard*, 391 S.C. 415, 420–21, 706 S.E.2d 16, 19 (2011) (“a party must make a contemporaneous objection that is ruled upon by the trial judge to preserve an issue for appellate review.”)

observed, “Where proof of a conversation has been of two different kinds, namely, a recording thereof and testimony by witnesses who overheard it, it has been argued that both the recording and the testimony were the best evidence.” *Id.* at 461, 123 S.E.2d at 841. The Supreme Court “conclude[d] that there was no error on the part of the Trial Judge when he refused to hold that the tape recordings of the confessions of the appellant were the best evidence. It was competent to prove the confessions by the oral testimony of the officers who heard such, even though a recording thereof was made.” *Id.* at 462, 123 S.E.2d at 841.

Critically, however, the *Worthy* Court “point[ed] out that the tape recordings of the confessions of the [defendant] had been made available to his counsel. There is no showing that the contents of the recordings were any different from the oral testimony of the officers who heard the confessions. If there was a difference, the recordings could have been used for the purpose of impeaching these witnesses.” *Id.* at 462, 123 S.E.2d at 841-42. Here, however, the “key machine” video footage was never made available to the defense, and, therefore, *Worthy* supports defense counsel’s argument that testimony about the video footage was inadmissible.

The State’s reliance on *State v. Halcomb*, 382 S.C. 432, 676 S.E.2d 149, was error. In *Halcomb*, the girlfriend of Halcomb’s codefendant told police officers that the codefendant had written her a letter in which the codefendant disclosed that he had a motive to murder the decedent. *Id.* at 438, 676 S.E.2d at 152. “Law enforcement testified that they never received the letter and that [the girlfriend] stated that she had destroyed the letter. The only evidence of the existence of the letter or its contents was [the girlfriend’s] statements.” *Id.* This Court found the trial court erred in refusing to admit evidence of the codefendant’s letter. *Id.* at 443, 676 S.E.2d at 154. This Court explained, “The record does not reveal that the original letter was destroyed through any bad faith of the proponent; thus, there was no basis for excluding [the girlfriend’s]

statements about the letter under the best evidence rule.” *Id.* at 444, 676 S.E.2d 155. The State’s reliance on *Halcomb* was error here, since the record did show the original recording was destroyed in bad faith. As seen, defense counsel argued that the destruction of evidence was in bad faith since police officers recovered every video from the dealership except the one critical to establishing Appellant’s involvement in the crime. R. 52, ll. 3-12.

The court’s error was not harmless. “Error is harmless when it could not reasonably have affected the result of the trial.” *State v. Reeves*, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990). Here, testimony that Appellant was seen via a video recording taking the truck key shortly before the truck was stolen likely caused the jury to find Appellant guilty. Absent this critical evidence, which was erroneously admitted, Appellant’s actions could at best be seen as suspicious. This Court should reverse.

CONCLUSION

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

s/ Joanna K. Delany
Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of October, 2020.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Dwayne Eigner 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 R. Scott Sprouse, which was held on January 29, 2020, 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 Dwayne Eigner.

Respectfully Submitted,

s/ Joanna K. Delany

Joanna K. Delany
Appellate Defender
ATTORNEY FOR APPELLANT

This 26th day of October, 2020.

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.”

October 26, 2020.

s/ Joanna K. Delany

Joanna K. Delany
Appellate Defender

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