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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Darlington County
The Honorable Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2019-001483

THE STATE, Respondent,

v.

WILLIAM JOHNATHAN BRUNSON, Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial judge erred in admitting a mug shot of Appellant where the State had a demonstrable need for the photograph, and the photograph did not indicate Appellant had a criminal record or otherwise draw attention to its origin?

STATEMENT OF THE CASE

In August 2019, a Darlington County Grand Jury indicted Appellant for one count of burglary first degree. On August 26-27, 2019, a jury trial was held in the Darlington County Court of General Sessions with the Honorable Thomas A. Russo, presiding. The State was represented by Assistant Solicitor Elaine Cooke of the Fourth Circuit Solicitor's Office. Appellant did not appear for trial and a trial was held in his absence. Rachel Gainey, Esq. represented Appellant. At the conclusion of trial, the jury convicted Appellant of burglary first degree. The trial judge issued a bench warrant for Appellant and sealed his sentence. Appellant was arrested and brought to court on August 28, 2019. Judge Russo unsealed the conviction and sentenced Appellant to twenty-four years' imprisonment.

STATEMENT OF FACTS

On October 10, 2018, Ashley Little left her residence in Darlington to purchase formula for her infant daughter. (R. 39-41). As Little departed, she attempted to close her garage door using the remote button in her car. (R. 41). However, because the weather stripping on the bottom of her garage door was dislodged, the door did not close. (R. 41). When Little returned, she noticed her garage door was open and a generator was missing from the garage. (R. 42). Little checked her security camera footage and witnessed an unknown white male taking a generator from her garage and loading it into his car. (R. 43, State's Exhibit #2). Little called law enforcement and turned over the video to the responding officer. (R. 43). Commander Neal Cusack of the Darlington County Sheriff's Office reviewed the security footage provided by Little. (R. 60). Cusack recognized the person in the footage but he did not know his name. (R. 13, 60). Cusack spoke with fellow law enforcement officers and obtained Appellant's name as a possible suspect. (R. 13, 61). Cusack viewed a mug shot of Appellant and recognized him from the security footage based on a red mark on his neck. (R. 14, 61-62, State's Exhibit #1).

Appellant was subsequently arrested and indicted for burglary first degree based on two prior burglary convictions. Appellant plead guilty to burglary third degree in 2016 and burglary second degree non-violent in 2009. (R. 58). Appellant did not appear for trial and was tried in his absence (R. 5-7). At trial, Cusack identified Appellant using the security footage and the photo of Appellant. (R. 62-64, State's Exhibit #1, State's Exhibit #2). Cusack testified he recognized Appellant from the red mark on Appellant's neck in both the photo and the security footage. (R. 62-63). Additionally, Cusack testified he further recognized Appellant from seeing him around the town of Hartsville during his twenty-years of working in the city. (R. 63-64). The photo used by the State was cropped to avoid appearing like a mug shot. (R. 12, State's Exhibit #1). Ashley

Little and her husband, Robert Little, testified they never gave Appellant permission to enter their home or take their generator. (R. 47, 65). Appellant was convicted at the conclusion of trial.

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. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "A trial [court]'s decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in 'exceptional circumstances.'" State v. Green, 412 S.C. 65, 79, 770 S.E.2d 424, 432 (Ct. App. 2015) (quoting State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 207 (Ct. App. 2008)). "If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." Id.

ARGUMENT

The trial judge did not abuse his discretion in admitting a mug shot of Appellant when the State had a demonstrable need for the photograph, and the photograph did not indicate Appellant had a criminal record or otherwise draw attention to its origin.

Appellant argues the trial judge erred by admitting a mug shot of Appellant because it was unfairly prejudicial to Appellant. Additionally, Appellant argues the photo was unnecessary for the State to prove its case and it was cumulative to other evidence presented. On the contrary, the State had a demonstrable need to introduce the photograph because Appellant was not present at trial. Furthermore, the photograph did not suggest Appellant had a criminal record nor was it introduced in such a way to draw attention to its origin. Accordingly, the trial judge did not abuse his discretion in admitting the photograph of Appellant.

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury..." Rule 403 SCRE. "The introduction of a 'mug-shot' of a defendant is reversible error unless: (1) the [S]tate has a demonstrable need to introduce the photograph, (2) the photograph shown to the jury does not suggest the defendant has a criminal record, and (3) the photograph is not introduced in such a way as to draw attention to its origin or implication." State v. Traylor, 360 S.C. 74, 84, 600 S.E.2d 523, 528 (2004).

Here, all prerequisites prescribed by the South Carolina Supreme Court for the admission of a mug shot in State v. Traylor have been met. First and foremost, there was a demonstrable need for Appellant's photograph to be admitted into evidence. Appellant was not present for trial. (R. 5-7). Therefore, no witness could make an in-court identification of Appellant and the jury had no way to determine if Appellant was the man in the security footage unless they had a photograph to compare the footage with. In State v. Denson, our Supreme Court previously held

the State had a demonstrable need to introduce a photograph of a defendant where there was no in-court identification of the defendant. The Court found "in the absence of an in-court identification, these photographs were an essential element of the State's case." State v. Denson, 269 S.C. 407, 412, 237 S.E.2d 761, 764 (1977). In Denson the defendant was present for trial and could be viewed by the jury; although no in-court identification took place. Denson, 269 S.C. at 410, 237 S.E.2d at 762. Here, Appellant was not present, thus enhancing the State's need to enter a photograph of Appellant.

In State v. Green, this Court found the State had a demonstrable need to introduce booking photos even though the defendant was present at trial because the photos could be compared by the jury to the photos of the armed robbery for which Green was on trial. Green, 412 S.C. at 82, 770 S.E.2d at 433. Furthermore, this Court noted the photos were highly probative evidence because they gave a clear view of Green's distinctive nose which law enforcement used to identify him. Id. Here, Cusack used the photo in question to identify Appellant based on a distinctive red mark on his neck. Like in Green and Denson, the State had a demonstrable need to enter the photo and the trial judge did not abuse his discretion in admitting the photo.

Secondly, the photograph shown to the jury did not suggest Appellant had a criminal record. The photo is a straightforward view of Appellant's face and neck. (State's Exhibit #1). It does not have any indications that it is a booking photo such as a placard around Appellant's neck or Appellant clearly dressed in a prison uniform. The solicitor stated the photo was cropped specifically to avoid any appearance of it being a mug shot. (R. 12). In State v. Ford, this Court held that a series of similar mug shots were proper where "Only the heads and necks of the individuals in the lineup photographs were visible in the photo lineup. The remainder of each

photograph was cut away. No identifying clothing or placards were visible in the lineup." State v. Ford, 334 S.C. 444, 450 n. 3, 513 S.E.2d 385, 388 n. 3 (Ct. App. 1999). Furthermore, the photo shown of Appellant did not have the "side-view profile...which is a feature commonly associated with police mug shots" that was ruled by this Court to be proper in Green. Green, 412 S.C. at 82-83, 770 S.E.2d at 434. Therefore, the trial judge properly admitted the photograph because it did not indicate Appellant had a prior criminal record[1].

Finally, the photograph was not introduced in such a way to draw attention to its origin or implication. When the State introduced the photo of Appellant, Cusack described how he began to obtain the photo by saying "I made several phone calls, got a name--." (R. 61, lines 2-3). Appellant objected before Cusack could finish his answer, but after Appellant's objection was overruled, Cusack elaborated further: "After obtaining a name I got a picture and looked at the picture and compared it to the security video and identified [Appellant] as being the one in question." (R. 61, lines 16-19). Cusack never mentioned anything about looking for Appellant in police files or looking through mug shots. In fact, Cusack was exceedingly vague about who he called to get Appellant's name or how he obtained a photograph. There was nothing about Cusack's answer or the State's questions to suggest the photo was a mug shot. Appellant's conviction and sentence should be affirmed.

[1] Even if the photograph suggested Appellant had a criminal record, Appellant could hardly have suffered any prejudice from such an association because the jury already knew Appellant had a criminal record from when his prior burglary convictions were entered into evidence. (R. 58).

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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CERTIFICATE OF COUNSEL

The undersigned hereby certifies the Final Brief of Respondent complies with Rule 211(b), SCACR.

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