

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Nov 24 2020

SC Court of Appeals

Appeal from Darlington County

Honorable Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WILLIAM JOHNATHAN BRUNSON,

APPELLANT

APPELLATE CASE NO 2019-001483

FINAL BRIEF OF APPELLANT

WANDA H. CARTER
Deputy Chief 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

The trial judge erred in allowing into evidence a police department booking mug shot of appellant in support of the arresting officer's identification verification of appellant as the perpetrator as shown in the residence garage from the home surveillance videotape because this was inadmissible prejudicial prior crime evidence that outweighed any probative value, particularly in light of the fact that the jury asked a curious question about the photograph at trial.

STATEMENT OF THE CASE

Appellant William J. Brunson was convicted per jury trial of first degree burglary during the August 2019 term of the Darlington County General Sessions Court before Judge Thomas Russo, who sentenced him to imprisonment for a period of twenty four years. Appellant was represented by Rachel Gainey at trial, and Assistant Solicitors Elaine Cooke and Monty Bell appeared on behalf of the state.

Appellant appealed his conviction and sentence. This brief follows.

STANDARD OF REVIEW

The admission of evidence is within the circuit court's discretion and will not be reversed on appeal absent an abuse of that discretion. State v. Dickinson, 395 S.C. 101, 716 S.E.2d 895 (2011). A trial court has particularly wide discretion in ruling on Rule 403 objections. State v. Lee, 399 S.C. 521, 732 S.E.2d 225 (Ct. App. 2012) see also State v. Dial, 405 S.C. 247, 746 S.E.2d 495 (Ct. App. 2013) (A trial judge's decision regarding the comparative probational value and prejudicial effect of relevant evidence should be reversed only in exceptional circumstance.)"

ARGUMENT

The trial judge erred in allowing into evidence a police department booking mug shot of appellant in support of the arresting officer's identification verification of appellant as the perpetrator as shown in the residence garage from the home surveillance videotape because this was inadmissible prejudicial prior crime evidence that outweighed any probative value, particularly in light of the fact that the jury asked a curious question about the photograph at trial.

At trial, state's witness Ashley Little testified that she left her home on the afternoon of October 10, 2018, and returned to find her garage door up and a generator missing from inside the garage. Little viewed the home surveillance video camera tape that captured the perpetrator at the garage door. R. 39, 1.3-p. 48, l. 6. Little stated that when she reviewed the tape, she saw "[appellant] pulling in trying to get in the side door and then entering the garage and taking the generator." R. 43 lines 9-11.

Police Officer Neal Cusack testified that he viewed the home surveillance video camera tape and believed he recognized the perpetrator. Officer Cusack testified that he made some calls and uncovered some names, and ultimately received a picture of appellant, which he compared to the perpetrator on the tape, and was then able to make a match identifying the perpetrator as appellant. R. 59, 1.19-p. 64, l.6.

Prior to trial, defense counsel objected to the admission of the booking photograph of appellant marked as state's exhibit #1 because it was a mug shot, which was prejudicial in that the mug shot was obviously generated from police department files and would signal to the jury that appellant had a prior criminal record. R. 15, 1.25-p.17, 1.25.

At trial, when state's exhibit #1 (appellant's mug shot) was offered into evidence, defense counsel objected again and was overruled by the trial judge. R. 64, 1.7-17. Also, defense counsel

renewed the same objection at the close of the state's case on the ground that the photo suggested that appellant had a prior criminal record. The court overruled the objection. R. 66, 1.18-p.69, 1.1.

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... or the needless presentation of cumulative evidence. Rule 403, SCRE. The introduction of a mug shot of a defendant is reversible error unless:

- 1.) The state has a demonstrable need to introduce the photograph,
- 2.) The photograph shown to the jury does not suggest the defendant has a criminal record,
- 3.) The photograph is not introduced in such a way as to draw attention to its origin

See State v. Traylor, 360 S.C. 74, 600 S.E.2d 523 (2004); State v. Denson, 269 S.C. 407, 237 S.E.2d 761 (1977); State v. Green, 412 S.C.65, 770 S.E.2d 424 (2015).

In State v. Tate, 288 S.C. 104, 341 S.E.2d 380 (1986), the Court reversed where the state introduced a photographic line-up that included a mug shot of the defendant that had an identifier indicating that it was a county sheriff department photograph. In State v. Lawson, 424 S.C. 51, 817 S.E.2d 509, the Court reversed where the state elicited testimony showing the defendant's print card originated from Kirkland Correctional Institution because it showed that he had a prior record and it was unnecessary to authenticate his fingerprints. In Traylor, supra, the Court held that there was no demonstrable need to introduce the photographic line up mug shot into evidence because the victims testified and described the assailants and because one codefendant identified appellant as an accomplice. The Traylor Court strongly admonished the state against the utilization of [mug shots] except in the rarest of cases." In Green, the booking photograph did not suggest a criminal record because the photo was taken as a result of his arrest in the case, and did not draw attention to its "origin or implication" and was cut off to avoid that problem.

In the instant case, Little stated that she saw that “he” was holding the generator in his hands and that she had not given appellant permission to be in the garage. R. 47, 1.1-25. Police Officer Cusack stated that he thought the perpetrator was appellant and confirmed it after making some calls and conducting his investigation and ultimately verified that the perpetrator on the tape was appellant after viewing a photograph that was found. R. 60, 1.15 – p. 61, 1.19. Hence, there was testimony by two state’s witnesses identifying appellant as the perpetrator, so the mug shot introduced as evidence was cumulative. Clearly, the jury could infer logically that the police officer’s finding of a photograph came undoubtedly from police files, and that the genesis of said photograph proved appellant had a prior record. Therefore, the mug shot evidence was unnecessary, cumulative, and more prejudicial than probative. The entrance of the mug shot as evidence violated appellant’s right to a fair trial under the Fourteenth Amendment.

Furthermore, there was proof that the jury members were aware of the possibility that the photograph of appellant was a prior booking mug shot because they sent in a question to the trial judge about the photograph that stated: “picture of [appellant] is it correct left to right.” R. 103, 1.6-8. The trial judge responded to counsels regarding the jury mug shot question as follows:

The Court: I’m just gonna write on here it’s a photograph. It is what it is. How else would I...say? R. 103, 1.8-10.

Then, the trial judge addressed the jury mug shot question to the jury as follows:

The Court: Alright...what I’ve put here is “the photo and video are items placed into evidence...the Court cannot comment on the evidence that is solely for the jury to evaluate. R. 103, 1.19-22.

Last but not least, note that the state presented evidence of two prior burglaries committed by appellant as part of its case-in-chief element to establish first degree burglary. This matters because appellant had already been portrayed as a serial burglar, and the photograph,

which was clearly a mug shot, indicated that there might have been other priors on appellant's criminal record.

All things considered, the prejudicial photograph mug shot admitted into evidence violated the prior crime prohibition provision and was inadmissible evidence, and the same violated appellant's due process right to a fair trial guaranteed under the Fourteenth Amendment.

CONCLUSION

Based on the foregoing argument, counsel for appellant would request that this Court reverse appellant's burglary conviction and sentence, and remand the case for a new trial.

s/Wanda H. Carter

Wanda H. Carter

Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 24th day of November, 2020.

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.”

November 24, 2020

s/Wanda H. Carter

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