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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Frank R. Addy, Circuit Court Judge

LEVITICUS DONYASKI YOUNG,

APPELLANT

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-001120

BRIEF OF APPELLANT
PURSUANT TO WHITE V. STATE

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in refusing to suppress surveillance camera video that only showed the front of the business where the crimes were committed?

STATEMENT OF THE CASE

In March of 2015, the Greenville County Grand Jury indicted Petitioner, Leviticus Donyaski Young, for assault and battery first degree, armed robbery and possession of a weapon during the commission of a violent crime, indictments #2014-GS-23-8396, 8398. (App. pp. 326-329). The indictment has a 2014 number but on one side 2014 is marked out and replaced with 2015. The date, March 10, 2015, is stamped on the other side of the indictment. The witness is listed as Alvin King with the Greenville County Sheriff's Office. The date listed under the witness's name is July 18, 2014. It is unclear how this witness was involved in the case other than to have purportedly testified before the grand jury on July 18, 2014, with the grand jury not true billing the indictment until March of 2015. There was no objection to the irregularities contained on the face of the indictment at trial or at the PCR hearing.

On January 11, 2017, Petitioner proceeded to jury trial before the Honorable Robin B. Stilwell on the assault and battery and armed robbery charges only. Lauren Taylor represented Petitioner at trial. Mark Moyer prosecuted the case. The jury returned verdicts of guilty and Judge Stilwell sentenced Petitioner to eighteen (18) years for armed robbery and ten (10) years concurrent for assault and battery first degree. (App. pp. 330-331). Petitioner filed a *pro se* notice of intent to appeal on January 26, 2017. The South Carolina Court of Appeal sent a deficiency letter to counsel on February 8, 2017. On May 5, 2017, the South Carolina Court of Appeals dismissed the appeal for failure to properly serve the notice.

On August 7, 2017, Petitioner filed an application for post-conviction relief [PCR]. (App. pp. 332-339). The State filed a return on March 9, 2018. (App. pp. 340-344). On April 19, 2018, an evidentiary hearing was held before the Honorable Frank Addy. R. Mills Ariail, Jr. represented Petitioner at the PCR hearing. Kelly Oppenheimer represented the State. In a

written order signed May 31, 2018, and filed June 6, 2018, Judge Addy denied relief and dismissed the application. (App. pp. 340-344). A timely notice of intent to appeal was served on June 13, 2018, and a petition for writ of certiorari was filed on January 25, 2019. The State filed a return on May 9, 2019, agreeing that Young was entitled to a belated direct appeal. On May 22, 2019, the South Carolina Supreme Court transferred the case to the South Carolina Court of Appeals pursuant to Rule 243(1), SCACR. On February 17, 2021, this Court granted a belated appeal and requested briefs. This brief of Appellant pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974) and Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986) 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 judge erred in refusing to suppress surveillance camera video that only showed the front of the business where the crimes were committed.

The jury found Appellant guilty of the assault and robbery of Juan Cabrera. In his opening statement the prosecutor told the jury that two men arrived at the Poinsett Tire business in a black Mercedes, robbed and assaulted Cabrera, the only employee, and then left. (App. p. 45, line 22 – p. 46, 47, lines 1-14). Cabrera chased the men in his car and the black Mercedes wrecked. (App. p. 47, line 15 – p. 48, lines 1-8). The prosecutor told the jury that Steven Williams was the driver and Appellant was the passenger who left the crash scene. (App. p. 48, lines 9-17). Counsel for Appellant told the jury that this was not a robbery but a follow up from a previous disagreement involving Cabrera, Williams, and Appellant. (App. p. 52, line 18 – p. 53, lines 1-11).

Prior to trial Appellant moved to exclude video surveillance evidence as more prejudicial than probative because the parties shown on the video were unidentifiable¹ and the video only showed the outside of the business and did not show a robbery or an assault. (App. p. 5, line 7 – p. 6, 7, lines 1-6). The trial judge preliminarily refused to exclude the video. (App. p. 7, line 7 – p. 8, lines 1-11). During the trial the State moved to admit the video through witness Cabrera. (App. p. 190, line 15 – p. 191, lines 1-10). The surveillance cameras that filmed the video came from a business next door. (App. p. 190, lines 18-19; p. 102, line 6 – p. 103, lines 1-12). Appellant renewed the pre-trial objection. (App. p. 191, lines 12-13). The judge overruled the objection. (App. p. 191, lines 14-15). The video surveillance was admitted as State's Exhibit #2 and played for the jury. (App. p. 191, line 16 – p. 192, lines 1-5). Cabrera testified about the

¹ Appellant was identified in court by Cabrera and another witness. It is not clear from the record what, if any, out of court identification procedures took place.

content of the video without objection. (App. p. 192, lines 8-23). The trial judge erred in admitting the video surveillance.

Rule 403, SCRE, provides that, “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 by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” “Unfair prejudice means an undue tendency to suggest decision on an improper basis.” State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009). The State argued, “It [the video] shows two men get out of the vehicle, go into the business. A few minutes later, come back out running into the vehicle. So, that is probative evidence regardless of whether or not it can be identified. That is probative evidence to show that a crime was committed, to show the vehicle that was used, shows the number of participants, shows the victim running out chasing the suspects after the incident. So, for those reasons Your Honor, the evidence is very probative.” (App. p. 6, lines 7-17). Counsel for Appellant correctly noted, “Your Honor, just briefly, the video does not show any crime taking place whatsoever.” (App. p. 6, lines 19-20). The judge stated, “Based on what you told me, I don’t - - I think the suggestion from the Defense it doesn’t show anything, which would suggest it isn’t prejudicial at all. Your position is it just isn’t probative of anything.” (App. p. 7, lines 15-19). The video surveillance shows the front of the business but not what happened inside.


The judge then stated that he would give deference to both sides and said, “Even if it has very little value and very little merit, it may have some merit. So, long as there’s an assertion that it is relevant and it shows - - on this instance, it shows the crime scene and some activity on or about the crime scene. At a threshold, I suspect that it’s relevant. I will not exclude it at this point.” (App. p. 7, line 24 – p. 8, lines 1-5). Appellant did not argue that the video surveillance

was irrelevant. Instead, Appellant argued that the probative value of the video surveillance was substantially outweighed by the danger of unfair prejudice. The judge failed to balance the minimal probative value with the danger of unfair prejudice.

In State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008), this Court wrote, “When juxtaposing the prejudicial effect against the probative value, the determination must be based on the entire record and will turn on the facts of each case. State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876, (2007) (citing State v. Bell, 302 S.C. 18, 30, 393 S.E.2d 364, 371 (1990)).” The defense in this case was that while this may have been an assault and battery stemming from an earlier disagreement, it was not a robbery. Counsel for Appellant argued this to the jury in both the opening statement and closing argument. (. (App. p. 52, line 18 – p. 53, lines 1-11: p. 301, lines 13-24). The video surveillance of the outside of the business is not probative of whether a robbery took place inside the business. The State relied on Cabrera’s testimony and some money found on the co-defendant, Williams, for evidence of a robbery. The error in admitting the surveillance was particularly prejudicial when the assault and battery was elevated to first degree because it was alleged to have occurred during the commission of an armed robbery. (App. p. 327; p. 274, line 24 – p. 275, lines 1-9). Under the narrow facts of this case, the trial judge erred in admitting the surveillance video when the probative value of the video was substantially outweighed by the danger of unfair prejudice.

CONCLUSION

Based on the above argument, this Court should reverse Petitioner's convictions and sentences and remand for a new trial.



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This 14th day of April, 2021.