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**May 24 2021**  
**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Greenville County

Honorable Frank R. Addy, Circuit Court Judge

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LEVITICUS DONYASKI YOUNG,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-001120

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REPLY BRIEF OF APPELLANT PURSUANT TO WHITE V. STATE

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**TABLE OF CONTENTS**

TABLE OF CONTENTS .....i

TABLE OF AUTHORITIES ..... ii

ARGUMENT IN REPLY.....1

CONCLUSION.....5

**TABLE OF AUTHORITIES**

**Cases**

State v. Brazell, 325 S.C. 65, 480 S.E.2d 64 (1997).....4

State v. Elders, 386 S.C. 474, 688 S.E.2d 857 (Ct. App. 2010) .....4

State v. Gray, 408 S.C. 601, 759 S.E.2d 160 (Ct. App. 2014) .....3

State v. Hambright, 310 S.C. 382, 426 S.E.2d 806 (Ct.App.1992) .....4

State v. Phillips, 430 S.C. 319, 844 S.E.2d 651 (2020).....3

**Rules**

Rule 403, SCRE.....3, 4

## ARGUMENT IN REPLY

**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. According to Cabrera, both the assault and the robbery took place inside the Poinsett Tire business where he worked. Surveillance video from a business next door to the Poinsett Tire business captured what happened outside of the business but not what happened inside. Prior to trial Appellant moved to exclude the video surveillance evidence as more prejudicial than probative because the parties shown on the video were unidentifiable 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 disagreed ruling, “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 - - in 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. At trial the surveillance video was admitted over objection. (App. p. 191, lines 12-- p. 192, lines 1-5).

In opening statement the attorney for Appellant told the jury:

And maybe it’s a little unorthodox of me, but I would argue to you at this point, the facts are more conducive with an assault and battery in this case and not an armed robbery. The State was overzealous. They got the wrong charge. What I would argue is that Mr. Cabrera, in fact, did know these co-defendants, Mr. Williams and Mr. Young. That they had a prior altercation a week or two before at the Polo Club Apartments over an unnamed female, who we still have not

figured out who this individual is. And this incident was a followup of this previous incident.

This was not a robbery. They did not go there intending to rob them. You even heard the solicitor state there was money left on the ground. What kind of robbers go and do that and leave money behind? This was an incident between people that knew each other having an altercation. This was not an armed robbery. And we believe the facts and the evidence is going to show you that.

(App. p. 52, line 17 – p. 53, lines 1-11). In closing argument the attorney for Appellant argued, “This was an assault and battery. This was guys that was roughing him up. Two guys that got into a fight and he wanted to continue the fight because he was mad. He told you he was mad. He wanted to continue to fight. This is an assault and battery. Check that box. Make them do their job. The window is too dirty to say armed robbery. It’s just too dirty. You and I are citizens, we have to hold them accountable and make them do their job. Thank you.” (App. p. 301, lines 15-24). The video surveillance had very little probative value when Appellant admitted to being present at the Poinsett Tire business and committing an assault and battery. The video surveillance of the outside of the business is not probative of whether a robbery took place inside the business.

The prejudice results from the fact that Appellant was indicted and convicted of armed robbery as well as assault and battery first degree as a result of the act occurring during the commission of a robbery. The indictment reads, “That LEVITICUS DONYASKI YOUNG did in Greenville County, on or about the 6<sup>th</sup> day of June 2014, unlawfully injure Juan Cabrera Figuero, and the act occurred during the commission of a robbery, burglary, kidnapping or theft.” (App. p. 327). In closing argument the prosecutor told the jury, “Now, assault and battery. In order for you to find it to be assault and battery first degree, which is the charge that is before you, well, you would have to determine that a robbery was taking place. Because assault and battery first degree means there’s either an assault or an attempted assault committed during like

a burglary or a robbery. So, if you believe that Juan was assaulted, as the pictures show you, and you believe that this was done during a robbery, then you can find him guilty of that charge of assault and battery first degree.” (App. p. 274, line 24 – p. 275, lines 1-9).

The judge instructed the jury, “With regard to assault and battery in the first degree. A person commits the offense of assault and battery in the first degree if the person unlawfully injures another person and the act occurred during the commission of a robbery, burglary, kidnapping or theft.” (App. p. 311, lines 13-18). The assault and battery first degree was dependent on the jury finding that a robbery took place. The State relied on Cabrera’s testimony and some money found on the co-defendant, Williams, for evidence of a robbery.

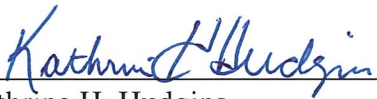
The key determination to be made by the jury was whether or not a robbery took place inside the business or if this was simply an assault and battery resulting from an earlier altercation. The surveillance video was not probative of whether or not a robbery took place inside the business. The trial judge erred in failing to properly weigh the lack of probative value pursuant to Rule 403 and failing to exclude the surveillance video. The error was not harmless.

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.” “To understand the probative value of any evidence, we must consider what was practically in dispute at trial. State v. Gray, 408 S.C. 601, 610, 759 S.E.2d 160, 165 (Ct. App. 2014).” State v. Phillips, 430 S.C. 319, 327, 844 S.E.2d 651, 655 (2020). In most cases identity is an issue and even a surveillance video where the individuals can not be specifically identified may be probative as to identity. In the present case, however, identity was not an issue as Appellant admitted being at the business and committing an assault

and battery. “Ordinarily, it is not an abuse of discretion to admit photographs that corroborate testimony. State v. Hambright, 310 S.C. 382, 388, 426 S.E.2d 806, 809 (Ct.App.1992). However, “[p]hotographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions.” State v. Brazell, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997).” State v. Elders, 386 S.C. 474, 483, 688 S.E.2d 857, 862 (Ct. App. 2010). The video surveillance of the outside of the business did not corroborate Cabrera’s testimony about a robbery inside the business. The video was not necessary to substantiate material facts or conditions and instead was simply calculated to arouse the prejudice of the jury. The trial judge erred in refusing to exclude the video surveillance pursuant to Rule 403, SCRE.

**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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Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR APPELLANT

This 24<sup>th</sup> day of May, 2021.

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CERTIFICATE OF SERVICE

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Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Reply Brief of Appellant Pursuant to White v. State in the above referenced case has been served upon William F. Schumacher, IV, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and a copy of the Reply Brief of Appellant Pursuant to White v. State has been served on Leviticus Donyaski Young, #311607, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 24<sup>th</sup> day of May, 2021.

  
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