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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Eugene C. Griffith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KIERIN MARCELLUS DENNIS,

APPELLANT.

APPELLATE CASE NO. 2019-001486

SUPPLEMENTAL RECORD ON APPEAL

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1 he's called by, that's what he's called by.

2 MS. SIMPSON: Thank you, Your Honor. And then as to
3 motion 16, this is regarding the exclusion of the aerial
4 photographs taken by Mike Phipps. It's my understanding
5 that what law enforcement did in this case was
6 subsequent, sometime down the road from a helicopter took
7 aerial photos, however, in those maps if they're
8 intending to introduce them, they have a section where
9 three police cars were lined up, one, two, three and then
10 marked on that map. We would object to that as being
11 both confusing, misleading to the jury, it is not an
12 accurate depiction of anything and does not go to reflect
13 anything in this case.

14 I believe the argument was to show the dimensions
15 and things of that nature, but they have the aerial
16 photographs or Google maps, whatever they use, but to
17 manipulate it by putting police cars lined up at one
18 specific entrance that doesn't have people around it, it
19 doesn't show what actually occurred or not even a
20 re-enactment essentially of what's on the video, that
21 that would be unfairly prejudicial, and like I said,
22 completely misleading and confusing to the jury.

23 THE COURT: I remember those the first time.

24 MR. HUBBARD: Yeah. And here's why they're not only
25 not confusing, but they're absolutely necessary. They

1 have raised the issue of self defense. Our argument, and
2 you heard it repeatedly in that trial, he had so many
3 different ways to leave. I can't expect 12 jurors to
4 know exactly where we're talking about, so a photograph
5 is a photographs. These officers will identify, yes,
6 that is where this restaurant is. There's all these
7 places and ways to leave or come. That's critical. Why
8 did he choose to take the path he took? The three cars
9 are very important, too, because you will remember the
10 testimony was other cars were leaving in the proper lane,
11 but Mr. Dennis drove into a crowd and almost or possibly
12 did hit the curb in the oncoming lane. It's unmarked.
13 And it would only be confusing if we just talked about
14 it, but what law enforcement did, they put unmarked
15 vehicles. They're not police cars just to show.

16 THE COURT: I think - I remember being surprised
17 that nobody asked to go down and drive through the
18 restaurant on the jury. And I would entertain that, if
19 somebody asks, put them on a van and ride them around.

20 MR. HUBBARD: Well, I was gonna -- That's a
21 possibility at the end of this, but during the testimony
22 to explain it so they know what to look for, that's what
23 we would do and if there's anything different since the
24 time of the photographs were taken that they would find
25 now, we would point that out. But these photos will be

1 as that was at that time. They're very important to us
2 because it goes to their defense and it also goes to what
3 happened and where those cars are are where the defendant
4 was, his vehicle, right in that area near the curb so
5 it's directly related to our testimony.

6 MS. SIMPSON: And, Your Honor, if I may respond.
7 Those police cars based on my understanding of the Cook
8 Out location and where things were, of course, there are
9 different perspectives, but those are at the very top of
10 the entrance which is exactly where this did not occur,
11 plus the police cars they argue were for purposes of
12 showing kind of the dimension of three lanes, however,
13 that road is essentially a two lane road. We have no
14 idea --

15 THE COURT: I think we'll wait until we get closer
16 to it on that. I remember this coming up last time and
17 it being a reference thing, just giving a reference. It
18 may be easier if y'all agree or decide to let the jury
19 see those.

20 MR. HUBBARD: And, Your Honor, I can bring them in
21 right now just so Your Honor can see them.

22 THE COURT: I remember them.

23 MR. HUBBARD: Basically what I intend to do, we'll
24 have the videos, we'll discuss what's on there, but this
25 is a daylight, clear day series of photographs and the

1 ones we're talking about you will notice there's no
2 marked vehicles here, but you can probably get a fourth
3 one in there, right there.

4 MS. SIMPSON: And, Your Honor --

5 MR. HUBBARD: So it's not marked. It's not marked
6 at all, but to say that it's confusing, this jury, if
7 they haven't been out here, they don't know any of this.
8 They don't know how wide this road is. They don't know
9 any of that. All of this is going to be very important
10 to their observations and to our argument, where Will
11 Zander was. Now, this incident occurred right about
12 here. This is where when you see that Ford Explorer,
13 it's right here except a little closer right here to this
14 curb. That's where that is. So they're just showing the
15 space because the argument was self defense. I couldn't
16 get out. I was trapped in the oncoming lane next to the
17 curb where all the students were, and I had no other way
18 to get out, or I went there for a specific reason, all of
19 that is gonna be important and I've got the burden so
20 that's why. I'm fine with cross all day long.

21 MS. SIMPSON: And, Your Honor, my primary thing, we
22 have no idea about if they used it before which was the
23 testimony, the dimensions, the width, how big these cars
24 are, how much space is in between them, if they want to
25 measure it, that's one thing, but to put up three cars

1 there to show something that is not accurate because
2 three cars are not gonna drive out that way, it is
3 essentially a two lane road so I think that if they want
4 to just show the map without the placement of the police
5 cars or add in a bunch of kids around one car and put
6 where they believe Will Zander's car is, that would be
7 more accurate, and this is a daytime photo as well.

8 THE COURT: I think I'm gonna wait. I don't see a
9 problem with it. I don't see how it's prejudicial. You
10 can introduce a map that has no cars there. The video is
11 gonna be the key piece of evidence from what I remember
12 last time, the video, the kids out there and all of them
13 talking. I don't think I'm gonna say that's in or out
14 right now. I don't see the prejudicial --

15 MR. RUTHERFORD: Your Honor, if I might, the problem
16 is, and if you remember after they brought that picture
17 in, the line of questioning was, was he in lane one, lane
18 two, or lane three. It's a two lane road and as Your
19 Honor just stated, we can introduce - well, they've
20 pushed the presumption over to us that we then have to
21 rebut to say this is not a three lane road. As my
22 co-counsel stated, they can measure it and they can say
23 DOT says a lane is 10 feet wide. This is 20 feet wide.
24 But to take three cars or four cars and stack them in and
25 act like it makes it a three lane road, it is not. It's

1 not a two lane road with a median in it. It is not. It
2 is at best a two lane unmarked road and their questions
3 on what made it a shift because they want is it lane one,
4 lane two, or lane three, and they repeatedly went back to
5 one, two, or three. Any highway patrol diagram, any MAIT
6 diagram, any police diagram that deals with what car lane
7 is in, look at the number of lanes on a road, was it lane
8 one or lane two.

9 What the Solicitor's Office has done is turn this
10 into a three lane road by parking three cars there, two
11 SUV's and a car, I don't know why. I don't know if they
12 couldn't fit three SUV's. Can they go drive all at the
13 same time? We don't know and it creates something that
14 we would have to rebut which we're unable to do so
15 because we don't have a helicopter and we don't have the
16 ability to go out there that day and say this doesn't
17 work. We don't know whether they had to drive two miles
18 an hour to get there. We don't know the elevation. We
19 don't know a number of things which we would have to do
20 to rebut the fact that this is not a three lane road
21 which they have since created, the Solicitor's Office in
22 just parking three cars there.

23 MR. HUBBARD: I can clarify this. I am not as a
24 representative of the State trying to say this is a three
25 lane road. It's not my objective. My objective is to

1 show this is a wide road. I don't know why it's wide. I
2 didn't create it, but it's so wide you can fit just from
3 practical purposes three cars there. It doesn't matter.
4 I don't expect three cars to drive up and down there.
5 That's not my point either. My point is when a witness
6 is on the stand without reference to anything saying
7 where was this car and then the defendant saying I
8 couldn't get around it, I've got to show space.

9 Now, I can take a measurement, but again this jury
10 doesn't, if they don't have that aerial, they don't know
11 what I'm talking about. They see a visual, they go,
12 okay, I get it. Now, when I talk about when Will Zander
13 pulls up, is he in the middle of that road? Yes. That's
14 where Mr. Graham was referring to lanes just for factual
15 purposes.

16 THE COURT: Is that the one who threw the money out?

17 MR. HUBBARD: He's the one that threw the money out.
18 Mr. Adams went out the proper lane which you would think
19 is the proper lane. It is wide though. He had no
20 problem getting out. You will see that, and you'll
21 remember that when Mr. Dennis came into that crowd, he's
22 right up on the curb if not on it and there's even cars
23 going past him at some point. It is extremely important
24 just not to say that the highway department has or hasn't
25 created lanes. We're talking about the width of a road.

1 And, Your Honor, the best way to do it is visual and not
2 with some number the jury can't understand. If somebody
3 says something is 20 feet, these people would all have
4 different ideas what 20 feet is.

5 THE COURT: Okay. That's why I thought going out
6 there is a good idea.

7 MR. HUBBARD: Yeah. And that's why I would like to
8 consider that, but I want this jury to know if they go
9 out there, God, you can get three cars. Heck, you might
10 even get four just to show the amount of space so when a
11 man says this was the only way I could get out, they can
12 consider that or if he says that's the way I had to go or
13 there's a reason why I went, they can get that.

14 THE COURT: All right. I understand your point.

15 MR. RUTHERFORD: Your Honor, the problem he just
16 testified. He called it an adjective which is wide. It
17 is not. It is at best a two lane road and we have
18 standards in this state and around this country for how
19 wide a lane is. DOT can come in and say the standard
20 lane is 10 feet, this road is 30 feet. It's enough for
21 three lanes. They wouldn't say that. The road is not
22 wide at all. It is at best at two cars and to throw a
23 third car in or move it real far up against the curb in
24 trying to get a fourth one in, it's creating something
25 that my client then has to rebut. It is not wide. Our

1 contention is it is extremely narrow and again, and I
2 objected the last time to the overhead shots as well. We
3 don't do anything based on an overhead shot. We didn't
4 walk in this courtroom today based on an overhead shot.
5 You drive up and you go in the door and what you see is
6 what's in front of you. If you're looking at an
7 overhead, maybe you then find out that there's another
8 entrance on the other side or another entrance in the
9 front, but that's not how anybody does it.

10 What he's asking is that these jurors see what
11 nobody saw that night which is an overhead shot of three
12 cars lined up this way, an overhead shot of an exit back
13 around the other way that nobody possibly knows exists.
14 So again, to add to this dimension that the Solicitor's
15 Office has always added in by use of a helicopter that my
16 client already doesn't have, he now has added cars in to
17 show width that does not exist but for a possible
18 overhead shot and someone being able to lineup three
19 cars. It is inconsistent with anyone's testimony. They
20 can only react off of what was saw. No one that night
21 saw that overhead shot. No one that night saw three cars
22 standing there to know that they could possibly get
23 around, period.

24 MR. HUBBARD: We're not offering it for any of that.
25 It would be simply be so jurors know a visual, not to see

1 how many lanes are or aren't there, visually you can fit
2 three cars there so when he's talking about what he could
3 and couldn't do, that's relevant and then as far as the
4 other aerials there's gonna be testimony that Mr. Dennis
5 had been to Cook Out many times. He lives around here
6 and those of us that live on his side of town when we're
7 up there, we're pretty much familiar with those
8 alternatives how to get in and out. He's talked about
9 it. So all of that becomes relevant with testimony and,
10 Your Honor, that's what it would be brought in for. It's
11 not anything to do with DOT. It's not anything to do
12 with creating lanes or make believe. And it does nothing
13 to shift the burden.

14 It's my duty to attack self defense. I've got to
15 disprove it beyond a reasonable doubt and this goes to my
16 argument on that. And, yeah, nobody knew about this
17 aerial. That's not for the people there that night.
18 Most of them were Dutch Fork kids that didn't know
19 anything about how to get in and out of there. They just
20 knew the front door, too. But for somebody that's been
21 to Cook Out multiple times sunny days, rainy days, dark,
22 light, he knows the ins and outs. By where he parked he
23 showed he knows that area down at car wash. His friend
24 is parked over at the pet shop. Judge, I mean, just
25 everybody knows that lives around here.

1 MR. RUTHERFORD: So let's make him prove that he did
2 it. That's what's called a burden shifting.

3 MR. HUBBARD. I don't know what I'm asking him to
4 prove. I have no idea.

5 THE COURT: Let me sit on this. I've heard enough
6 talk about the map. I think we can get it resolved.
7 Let's move onto something else. I'm gonna take that
8 under advisement. When we get there, it will be much
9 easier to manage.

10 MR. HUBBARD: And if I could, Your Honor, we're
11 going down the list of their motions. The one about
12 having a Neil v. Biggers hearing, Your Honor, if we're
13 gonna do that for every witness, Your Honor, that's just
14 cross at this point. Really if that was gonna be done,
15 it should have been done a long time ago. All of these
16 kids now, all of them have seen videos, they've seen
17 photos so technically if you're saying has the State done
18 anything at this point to suggest anything, their
19 argument is gonna be, heck, they've been through multiple
20 hearings so I'm really not sure how you even begin to do
21 a Neil v. Biggers. I think it's really gonna come down
22 to cross examination. Did the State show you this. Did
23 the State tell you who to pick out. All those things.
24 It's just cross.

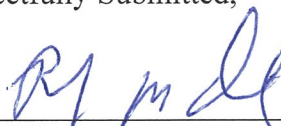
25 MS. SIMPSON: And, Your Honor, if I may, the law is

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Supplemental Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Supplemental Record on Appeal complies to the best of my ability with 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."

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This 30th day of September, 2021.