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Jun 17 2022
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Frank R. Addy, Circuit Court Judge

THE STATE, RESPONDENT,

V.

DAMIEN LAVAR RITTER, APPELLANT

APPELLATE CASE NO. 2021-000710

ANDERS BRIEF OF APPELLANT

ADAM SINCLAIR RUFFIN
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STATEMENT OF ISSUE ON APPEAL

Whether the trial judge erred in allowing the state to introduce evidence of text messages allegedly sent by Appellant to one of the decedents prior to the shooting which indicated that Appellant was involved in drug dealing where the text messages were not admissible under the motive and intent exceptions to Rule 404(b), SCRE or as res gestae, and even if they were, the text messages were still not admissible because their probative value was substantially outweighed by the danger of unfair prejudice under Rule 403, SCRE?

STATEMENT OF THE CASE

Appellant was indicted by the Lexington County grand jury for two counts of murder, one count of attempted murder, armed robbery, and kidnapping. R. 2128-2129, 2131-2132, 2134-2135, 2137-2138, 2140-2141. Appellant was tried before the Honorable Frank R. Addy and a jury from June 21 – 28, 2021. Appellant was represented by Jim Brown and Dayne Phillips. The state was represented by Sutania Fuller and Shawn Graham. R. 700.

The jury found Appellant guilty as charged on each count. R. 2094, l. 12 – 2095, l. 8. The judge sentenced Appellant to life imprisonment for each of the murder convictions, thirty-years imprisonment for attempted murder and kidnapping, and ten-years imprisonment on armed robbery. All sentences were concurrent. R. 2126, ll. 1 – 10.

This appeal follows.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). Appellate courts are bound by a trial judge's factual findings unless they are clearly erroneous. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006) (citing State v. Quattlebaum, 338 S.C. 441, 442, 527 S.E.2d 105, 111 (2000)). "The appellate court does not re-evaluate the facts based on its own view of the evidence but simply determines whether the trial judge's ruling is supported by any evidence." State v. Lyles, 379 S.C. 328, 333, 665 S.E.2d 201, 204 (Ct. App. 2008).

"[I]n order for this Court to reverse a case based on the erroneous admission or exclusion of evidence, prejudice must be shown." State v. Taylor, 333 S.C. 159, 172, 508 S.E.2d 870, 876 (1998). "To show prejudice, there must be a reasonable probability that the jury's verdict was influenced by the challenged evidence or the lack thereof." State v. White, 372 S.C. 364, 374, 642 S.E.2d 607, 611 (Ct. App. 2007) (citing Fields v. Regional Medical Center Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005)).

In reviewing a trial court's ruling on the admissibility of evidence, appellate courts recognize that the trial judge has considerable latitude in this regard and will not disturb such rulings absent a prejudicial abuse of discretion. State v. Whitner, 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012); State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Whitner, 399 S.C. at 557, 732 S.E.2d at 866.

STATEMENT OF FACTS

On July 5, 2018, at approximately 2:15 p.m., James Anderson heard some "pow pows" in his apartment complex which he initially thought was someone shooting firecrackers. R. 1003 ll. 9 – 14. Anderson then heard his neighbor screaming so he went outside to speak with her. R. 1004, l. 2 – 1005, l. 13. Anderson's neighbor was screaming "they've killed my son," so Anderson called 911. R. 1006, ll. 4 – 9. While Anderson was on the phone with 911, he entered the apartment and found two males lying on the floor with apparent gunshot wounds. R. 1012, ll. 2 – 14.

A short distance from the apartment complex where the shooting took place, Ashton Miles with the West Columbia Water and Sewer Department was working on water line repairs on Platt Springs Road. R. 1046, ll. 2 – 11. While Miles was working, he recalled that an individual – later identified as Rodney Furtick – pulled into their work area in a white Dodge Challenger and said that "his homeboy had been shot . . . [and t]hat he needed to use a cell phone." R. 1048, l. 13 – 1049, l. 18. Furtick identified the shooter as "his cousin." R. 1050, ll. 22 – 23. Miles recalled that they allowed Furtick to use their phone and that once he was finished using the phone "[h]e got back in the car, and he brandished a pistol that he got out of his glove box." R. 1051, ll. 3 – 5. A police car drove by with its sirens on and Furtick left in the Dodge Challenger and followed the police car. R. 1051, ll. 14 – 24.

Patrick O'Toole with the West Columbia Fire Department responded to the apartment where the shooting took place and was directed by police officers who were already on scene to two bodies on the floor of the kitchen. R. 1069, l. 4 – 1071, l. 4. O'Toole determined that one of

the bodies, Samir Atkins, was already deceased.[1] R. 1072, ll. 4 – 16. O'Toole then turned his attention to the other body, Elzie Mack, who was still breathing. O'Toole helped to load Mack into an ambulance when EMS arrived. R. 1072, l. 17 – 1074, l. 14. Mack died later at the hospital.[2] R. 1342, l. 22 – 1343, l. 6.

Chris Morris who was an investigator with the West Columbia Police Department arrived on the scene and spoke with Furtick outside the apartment. R. 1099, ll. 4 – 23. Furtick told Morris that the cousin of Samir Atkins, one of the decedents, was the shooter. R. 1102, l. 17 – 1103, l. 7. Furtick also said that the shooter left the scene in a burgundy Tahoe.[3] R. 1104, ll. 21 – 25. While Morris and Furtick were speaking, Furtick realized he had also been shot in the leg, so Morris directed him to an ambulance for medical treatment. R. 1103, l. 20 – 1104, l. 20. Morris later showed Furtick a photographic lineup and asked Furtick to select the person he was referring to as "cousin" who he witnessed shoot the two decedents and Furtick selected Appellant. R. 1109, l. 13 – 1113, l. 25; R. 1133, ll. 2 – 7.

Furtick testified that he and Samir Atkins were close friends, and that Elzie Mack was a friend of Atkins. R. 1202, l. 14 – 1203, l. 15. Furtick recalled that he was over at Atkins' house watching ESPN when Atkins received a phone call. According to Furtick, Atkins picked up the phone and said "I'm still here. You can pull up." Atkins told Furtick that it was his cousin on the

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1 Dr. Janice Ross performed an autopsy on Atkins and determined that he died from a gunshot wound to the back of the head. R. 1355, l. 11 – 1356, l. 19. Atkins also had a fully loaded pistol inside his waistband when his body was examined by law enforcement at the scene of the shooting. R. 1409, l. 15 – 1413, l. 4.

2 Dr. Janice Ross performed an autopsy on Mack and determined that he died from a gunshot wound to the back of the head. R. 1360, l. 24 – 1361, l. 15.

3 Appellant was the registered owner of a Chevy Tahoe with the Department of Motor Vehicles. R. 1374, l. 20 – 1375, l. 10.

phone. R. 1206, ll. 3 – 18. Furtick recalled someone knocking on the door and Atkins letting the person in. Atkins introduced the person to Furtick as Atkins' cousin. R. 1207, ll. 6 – 22.

Furtick stated that after the three of them sat in the living room for a brief time, the cousin asked Atkins to go to the kitchen with him. Atkins and the cousin walked into the kitchen and Furtick heard a gunshot. R. 1208, ll. 18 – 22. Furtick then ran down the hallway but was confronted by the cousin who had a gun pointed at him and directed Furtick back to the kitchen and made him lie down on the floor next to Atkins who had a bullet wound to his head. R. 1208, l. 24 – 1209, l. 10. Furtick then heard another person's voice say, "don't move, you won't get hurt." R. 1210, ll. 6 – 9. Furtick heard the cousin tell someone else to get on the ground and heard that person lie down. Furtick then heard another gunshot, turned his head, saw the gun pointed at him, and heard the gun "click." R. 1210, ll. 14 – 22. Furtick stated that the person holding the gun was Atkins' cousin. R. 1210, l. 25 – 1211, l. 3.

Furtick said he got up and grabbed the shooter's shirt but that there was another person with a gun who had also entered the apartment. Furtick heard another gunshot go off and he "threw [Appellant] into the person" and "got out of there." R. 1211, ll. 4 – 21. Furtick ran and got into his car and the two shooters got into a burgundy Tahoe. Furtick grabbed his gun from his glove box and began firing at the two shooters as they fled the scene in the Tahoe. R. 1214, l. 1 – 1216, l. 5. Furtick recalled driving down Platt Springs Road and stopping where the construction workers were and asking to use their phone. R 1220, ll. 1 – 13. Furtick said his phone had been stolen by the shooters. R. 1220, ll. 14 – 19. Furtick identified Appellant in front of the jury as the person who shot him, Atkins, and Mack. R. 1245, l. 11 – 1246, l. 16.

ARGUMENT

The trial judge erred in allowing the state to introduce evidence of text messages allegedly sent by Appellant to one of the decedents prior to the shooting which indicated that Appellant was involved in drug dealing because the text messages were not admissible under the motive and intent exceptions to Rule 404(b), SCRE or as res gestae, and even if they were, the text messages were still not admissible because their probative value was substantially outweighed by the danger of unfair prejudice under Rule 403, SCRE.

Relevant Facts

Defense counsel objected to the state introducing two text messages that were allegedly sent by Appellant to Samir Atkins prior to Atkins being killed. The first text was sent on June 21 and read: "Man, cuz, you've got to give me time to sell all that weed." R. 1636, ll. 20 – 25. The second text counsel objected to was sent on June 29 and read: "Cuz, my people is trying to get half a bag." R. 1637, ll. 1 – 2. Counsel argued that both of these text messages were inadmissible pursuant to Rule 404(b), SCRE. R. 1637, ll. 3 – 7.

The state responded that the texts were admissible pursuant to State v. McGee[4] because the texts were needed to tell the complete picture of the incident. The state maintained that there was continuous contact between Appellant and Atkins leading up to the killings. The state also argued that the text messages were relevant to motive and intent. R. 1637, l. 21 – 1639, l. 13.

The trial judge agreed with the state that the text messages were relevant to motive. R. 1647, ll. 6 – 13. The judge also ruled that the text messages were admissible as res gestae but

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4 Although the solicitor did not give a cite to the case it appears from the context the state was referring to State v. McGee, 408 S.C. 278, 758 S.E.2d 730 (Ct. App. 2014) which held that evidence of a prior theft was admissible in a prosecution for murder where the prior theft was part of the res gestae.

left open the question of how and when the text messages could be admitted. R. 1656, l. 16 – 1657, l. 12.

The state called Special Agent Farand Wasiak who was a senior special agent with SLED in the computer crime unit. R. 1675, ll. 1 – 16. Wasiak was qualified as an expert in digital forensics. R. 1675, ll. 17 – 21. When the state moved to introduce the disputed text messages into evidence, the trial judge ruled that the text messages were admissible "subject to the previous objections and all previous rulings." R. 1694, ll. 9 – 13.

The text message that was allegedly sent by Appellant to Atkins was then read to the jury: "Man, cuz, you've got to give me some time to sell all the weed. If I sell all the weed in two or three days, I won't make no money for me or pay you what I owe you. I'd be making enough just to get a half bag. I'm going to try to break it all the way down so I can pay you, brah. I have to borrow gas money, so you're shit can't be short." R. 1697, l. 19 – 1698, l. 3. In addition, a second text message was read to the jury that stated: "All right, cuz, my people is trying to get a half bag." R. 1699, ll. 12 – 17.

Discussion

Rule 404(b) of the South Carolina Rules of Evidence provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." "It is well established that evidence of other crimes or prior bad acts is inadmissible to show criminal propensity or to demonstrate the accused is a bad individual." State v. Gillian, 360 S.C. 433, 443, 602 S.E.2d 62, 67 (Ct. App. 2004). Furthermore, in order to be admissible, "[t]he bad act must logically relate to the crime with which the defendant has been charged." Id.

If the prior bad act which the state seeks to introduce against the defendant is not the subject of a criminal conviction, then "evidence of the bad act must be clear and convincing." State v. Stokes, 381 S.C. 390, 404, 673 S.E.2d 434, 441 (2009). Here, the trial judge erred in admitting the text messages which indicated that Appellant was involved in selling drugs. The allegation that Appellant was selling drugs was inadmissible character evidence because it amounted to a prior crime for which Appellant was not on trial and was not relevant to motive or intent.

In State v. Douglas, 302 S.C. 508, 397 S.E.2d 98 (1990), the defendant, who was on trial for murder, was alleged to have pointed a gun at, and threatened to kill, an associate of his the night before the murder while he and the associate were "horseplaying." The Supreme Court found that this bad character evidence was not admissible to show intent on the part of the defendant because the state showed no logical relation between the two incidents. Much like in Douglas, here, there was no logical relation between the alleged drug dealing and the alleged murders and therefore the text messages regarding drug dealing were not relevant to any intent of the alleged shooter. Furthermore, the text messages were not relevant to motive because the state did not show that Appellant was motivated to kill the decedents because he was a drug dealer. See State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009) (holding that evidence of defendant's prior escape from prison was relevant in a prosecution for failure to stop for a blue light in part because the prison escape was the motive for the defendant fleeing from law enforcement).

Furthermore, even if the prior bad character evidence is admissible under Rule 404(b), SCRE, it is still subject to the balancing test under Rule 403, SCRE. Id. Under Rule 403, relevant evidence "may be excluded if its probative value is substantially outweighed by the

danger of unfair prejudice." "Unfair prejudice means an undue tendency to suggest [a] decision on an improper basis." State v. Spears, 403 S.C. 247, 253, 742 S.E.2d 878, 881 (Ct. App. 2013). The text messages indicating Appellant was involved in drug dealing were unfairly prejudicial because they served to confuse the real issue by allowing the jury the opportunity to make the impermissible inference that because Appellant was a drug dealer, he was generally a bad person deserving of punishment. See State v. Williams, 430 S.C. 136, 141, 844 S.E.2d 57, 60 (2020) (holding the trial judge erred in allowing the state to introduce testimony regarding the defendant's prior incidents of domestic violence because the evidence was unfairly prejudicial).

This Court considered whether testimony as to the "wretched condition of the home" where the defendant and victim lived in a criminal sexual conduct case was admissible in State v. Smith, 309 S.C. 48, 419 S.E.2d 816 (Ct. App. 1992). This Court held in Smith:

> The testimony as to how the defendant lived is wholly irrelevant to the question of whether he is guilty of the crime with which he is charged. The fact that a person lives in abject squalor or in great splendor has nothing whatever to do with whether the person is guilty of having committed a crime. Criminality is not the exclusive province of any particular lifestyle. Crime happens in the suites as well as in the streets. *Thus, the law wisely recognizes that a defendant has the right to be found guilty or not guilty based on the evidence of what the defendant has done, not how the defendant lives.*

Id. at 49, 419 S.E.2d at 816–17 (emphasis added). In this case, the evidence showing that Appellant was involved in drug dealing was "wholly irrelevant" to the question of Appellant's guilt. As in Smith, it was error for the trial judge to allow evidence regarding Appellant's alleged drug dealing which was unrelated to whether Appellant was guilty of murder. Any probative value was substantially outweighed by the danger of unfair prejudice.

Finally, the text messages were not admissible under the theory of res gestae as enunciated in State v. Adams, 322 S.C. 114, 122, 470 S.E.2d 366, 370-371 (1996). The Fourth

Circuit, in determining whether a defendant's prior statements were inadmissible under Rule 404(b), FRE, noted that:

> One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence furnishes part of the context of the crime or is necessary to a full presentation of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its environment that its proof is appropriate in order to complete the story of the crime on trial by proving its immediate context or the res gestae or the uncharged offense is so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other and is thus part of the res gestae of the crime charged. And where evidence is admissible to provide this full presentation of the offense, there is no reason to fragmentize the event under inquiry by suppressing parts of the res gestae.

United States v. Masters, 622 F.2d 83, 86 (4th Cir. 1980) (cleaned up).

Evidence of Appellant's alleged drug dealing for which Appellant was not on trial, was not necessary in order to give a full presentation of the case against Appellant. The text messages were sent two weeks prior to the killings and were not close enough in time to be necessary in presenting the full picture of the state's theory. The earlier text messages had no bearing on whether Appellant was guilty of murdering the decedents or shooting Furtick.

The trial judge here erred by allowing the unfairly prejudicial text messages into evidence. The jury was shown the text messages and allowed to hear testimony that Appellant was involved in drug dealing which was clearly bad character evidence. A juror would easily be influenced by such evidence to presume that Appellant was generally a bad person and deserving of punishment based on factors unrelated to the alleged murders. This was improper evidence to put before the jury as it had absolutely no relevance to Appellant's guilt and would permit the jury to render a verdict based on improper considerations such as emotion. Appellant's convictions should be reversed.

CONCLUSION

By reason of the foregoing argument, Appellant's convictions should be reversed, and this case remanded to the Lexington County Court of General Sessions for a new trial.

Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of June, 2022.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Frank R. Addy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAMIEN LAVAR RITTER,

APPELLANT

APPELLATE

CASE NO. 2021-000710

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Damien Lavar Ritter states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge Frank R. Addy, which was held on , and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for Damien Lavar Ritter.

Respectfully Submitted,

Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of June, 2022.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Honorable Frank R. Addy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAMIEN LAVAR RITTER,

APPELLANT

APPELLATE CASE NO. 2021-000710

DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) Indictments, sentence sheets, verdict form
(2) Bond Hearing transcript dated February 26, 2019
(3) Bond Hearing transcript dated November 7, 2019
(4) Transcript dated December 4, 2019
(5) Bond hearing transcript dated September 9, 2020
(6) Transcript dated October 22, 2020
(7) Franks v. Delaware hearing transcript dated April 12, 2021
(8) Transcript dated April 14, 2021
(9) Entire trial transcript dated June 21-28, 2021

I certify that this designation contains no matter which is irrelevant to this appeal.

Adam Sinclair Ruffin
Appellate Defender

South Carolina Commission on Indigent Defense
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Columbia, SC 29211-1589
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ATTORNEY FOR APPELLANT

This 17th day of June, 2022.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders 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."

Adam Sinclair Ruffin
Appellate Defender

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ATTORNEY FOR APPELLANT

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APPELLATE CASE NO. 2021-000710

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Anders Brief of Appellant and Designation of Matter in the above-referenced case has been served upon Melody J. Brown, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Damien Lavar Ritter, #385612, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 17th day of June, 2022.

Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR APPELLANT