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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Honorable William A. McKinnon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRANDY VERNON HARRIS,

APPELLANT

APPELLATE CASE NO. 2021-001341

ANDERS BRIEF OF APPELLANT

SARAH E. SHIPE
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in admitting evidence that appellant, in the past, allegedly hit Linda Harris in this trial where he was charged with domestic violence and kidnapping of Harris and where the prejudice of those alleged prior bad acts substantially outweighed the probative value of the evidence and invited an impermissible verdict?

STATEMENT OF THE CASE

On December 12, 2020, a York County grand jury indicted appellant for domestic violence, second degree and kidnapping. R. Appellant's case was called to trial on November 8, 2021, before the Honorable William A. McKinnon and a jury. R. 1. Appellant was represented by Jeffrey Zuschke and Shawana Burris. The state was represented by Alexander Harper and Jenny Desch. R. 1.

On November 9, 2021, the jury found appellant not guilty of domestic violence but guilty of kidnapping. R. 169. The following day, Judge McKinnon sentenced appellant to two years' imprisonment for kidnapping. R. 190.

This appeal follows.

STANDARD OF REVIEW

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.

ARGUMENT

The trial court erred in admitting evidence that appellant, in the past, allegedly hit Linda Harris in this trial where he was charged with domestic violence and kidnapping of Harris where the prejudice of those alleged prior bad acts substantially outweighed the probative value of the evidence and invited an impermissible verdict.

Relevant facts

On August 26, 2020, law enforcement responded to a call at appellant's home that he shared with his then wife Linda Harris. R. 53, l. 24-54, l. 9. Both responding officers, Garrett Sane and BJ Gipson, activated their body worn cameras during their interaction with appellant at his home.[1] After a brief interaction with law enforcement appellant was arrested and later charged with domestic violence, second degree and kidnapping.

During pretrial motions, counsel for appellant moved to prohibit the state from bringing in any testimony about prior domestic violence incident where appellant was not convicted. R. 26, ll. 5-10. The solicitor indicated they did not intend to introduce any evidence of that nature but said that if the defense opened the door then that evidence would be fair game. R. 26, ll. 14-21.

The state asserted that video from Officer Gipson's body worn camera showed Harris saying that appellant slapped her and implied that he had slapped her before but in a manner that would not leave a mark. R. 28, ll. 2-15. The solicitor argued this portion of the video was admissible as res gestae to show why it was reasonable for Harris to be in fear that appellant would harm her. R. 27, ll. 11-17.

Counsel for appellant requested that the court watch that portion of the video to assess

[1] State's exhibit 1, video from Sane's body worn camera and State's exhibit 2, video from Gipson's body worn camera are on file with the Court.

whether it was admissible as res gestae or inadmissible as evidence of prior bad acts. R. 29, ll. 6-24. The court found that based on what it had heard thus far the evidence was admissible but would not make a final ruling until the evidence was introduced. R. 30, ll. 19-23.

At trial, appellant's ex-wife, Linda Harris testified that she and appellant were married for five years. R. 73, l. 16. She testified appellant eventually moved into an old school bus that he was renovating into a mobile home in the backyard, but he came into the home to use the bathroom. R. 71, l. 19-72, 4. Harris said that on the day of the incident appellant was irritable and became angry with her. Harris said she left the home for a few hours early in the day in hopes that appellant would calm down. R. 74, l. 14-75, l. 12.

She claimed that when she returned in the early afternoon, appellant was no calmer than when she left. R. 77, ll. 1-3; 78, l. 10. Harris said that she thought she should leave the house again but this time appellant "stopped her from exiting." She said that he "kept following [her] around, blocking [her] and screaming. R. 78, ll. 9-23. Harris said that although their home had a front door and a back door the backdoor was blocked, and she could only exit through the front door of the home and appellant had made that impossible. R. 79, l. 15-80, l. 11. Harris contented that this went on for four hours before she was able to call 911. R. 80, l. 25-81, l. 9. Harris testified that appellant did not "lay hands" on her at any point during this time. R. 82, ll. 8-12.

During Officer Gipson's testimony the state introduced state's exhibit 2, video from Gipson's body worn camera. R. 105, ll. 3-4. At minute three- and thirty-three-seconds Harris is describing the incident and says that she doesn't have any physical "scars." She goes on to imply that this has happened before and indicates physically how appellant would hit her in a manner that would not leave any marks. State's exhibit 2, video from Gipson's body worn camera. At minute ten- and eleven-seconds Gipson is discussing the incident with his superior and says, "she

said there's always some sort of like him hitting on her and pushing her every time he's in there." State's exhibit 2, video from Gipson's body worn camera.

Discussion

Evidence is relevant if it "ha[s] any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE; *State v. Schmidt*, 288 S.C. 301, 342 S.E.2d 401 (1986); *State v. Alexander*, 303 S.C. 377, 401 S.E.2d 146 (1991). All relevant evidence is admissible, unless constitutionally, statutorily, or otherwise provided. Rule 402, SCRE. However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE.

South Carolina law precludes evidence of a defendant's prior crimes or other bad acts to prove the defendant's guilt for the crime charged except to establish (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan, or (5) the identity of the perpetrator. Rule 404(b), SCRE; *State v. King*, 334 S.C. 504, 514 S.E.2d 578 (1999); *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923).

In order to admit evidence of bad acts not resulting in conviction, the trial court must, "[a]s a threshold matter, ... determine whether the proffered evidence is relevant." *State v. Clasby*, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). "If the trial judge finds the evidence to be relevant, the judge must then determine whether the bad act evidence [is admissible under the terms] of Rule 404(b)" to show, *inter alia,* the existence of a common scheme or plan. *Id.* If the testimony is relevant and proffered for a permissible purpose, the trial court must next conduct a balancing test, pursuant to Rule 403; where the testimony's probative value is substantially outweighed by the danger of unfair prejudice, the trial court may exclude it. *See State v. Gillian,* 373 S.C. 601,

611, 646 S.E.2d 872, 877 (2007); *see also* Rule 403, SCRE ("[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice ...").

Although *State v. Lyle* does not distinguish between sexual offenses and non-sexual offenses, the common trend in South Carolina is to apply the *Lyle* exceptions differently to sexual offenses. Compare *Lyle*, 125 S.C. 406, 118 S.E. 803 (a forgery case), to *State v. Nelson*, 331 S.C. 1, 501 S.E.2d 716 (1998) (a child molestation case, distinguishing the application of the *Lyle* exceptions for motive and intent from cases that were not sexual in nature). *State v. Fonseca*, 383 S.C. 640, 647–48, 681 S.E.2d 1, 4 (Ct. App. 2009), aff'd, 393 S.C. 229, 711 S.E.2d 906 (2011).

Two portions of state's exhibit 2, video from Gipson's body worn camera were objectionable because those portions included improper comments on appellant's character. *See German v. State,* 325 S.C. 25, 27,478 S.E.2d 687, 688 (1996). Evidence that implied appellant had previously slapped Harris was a violation of the evidentiary rule against presenting evidence of other crimes, wrongs, or acts. *See* Rule 404(b), SCRE. This evidence did not establish (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan, or (5) the identity of the perpetrator. *See* Rule 404(b), SCRE; *King*, 334 S.C. 504, 514 S.E.2d 578 (1999); *Lyle*, 125 S.C. 406, 118 S.E. 803 (1923). In fact Harris testified at trial that appellant had not hit her during this incident. Instead, this evidence was used by the state to improperly signal to the jury that because appellant had, allegedly, hit Harris in the past that he was guilty of domestic violence in this case.

The trial court erred in allowing inadmissible evidence of appellant's alleged prior bad acts. Appellant chose not to testify in the case against him and did not introduce his character into evidence during trial. Evidence that appellant acted a certain way in the past or had physically harmed Harris had no probative value in this case and were used to prejudice appellant. The trial court's error prejudiced appellant and this Court should reverse.

CONCLUSION

By reason of the foregoing, appellant requests this Court reverse appellant's conviction and remand for a new trial.

Sarah E. Shipe
Appellate Defender

ATTORNEY FOR APPELLANT

This 1st day of July, 2022.

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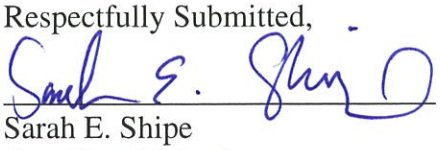
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Brandy Vernon Harris states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge William A. McKinnon, which was held on November 8 - 10, 2021, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She 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, she asks the Court to relieve her as counsel for Brandy Vernon Harris.

Respectfully Submitted,



Sarah E. Shipe
Appellate Defender

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DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

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

(1) Trial transcript dated November 8-10, 2021;
(2) State's Exhibit #1 (Compact Disc);
(3) State's Exhibit #2 (Compact Disc, Video);
(4) State's Exhibit #3 (Compact Disc, Audio); and
(5) Indictments and Sentence Sheets

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

Sarah E. Shipe
Appellate Defender

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(803) 734-1330

ATTORNEY FOR APPELLANT

This 1st day of July, 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."

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This 1st day of July, 2022.