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Nov 04 2022

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County

Honorable DeAndrea G. Benjamin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARK R. VOLSTROMER,

APPELLANT.

APPELLATE CASE NO. 2021-000676

FINAL BRIEF OF APPELLANT

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In this self-defense case, the trial court erred in refusing to allow the defendant and his wife to inform the jury of their knowledge of the decedent’s conviction for criminal sexual conduct and that the decedent had been hanging around with a man who molested the defendant’s daughter, which was relevant to the jury’s assessment of the defendant’s state of mind and the reasonableness of his actions.4

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STATEMENT OF ISSUE ON APPEAL

In this self-defense case, did the trial court err in refusing to allow the defendant and his wife to inform the jury of their knowledge of the decedent's conviction for criminal sexual conduct and that the decedent had been hanging around with a man who molested the defendant's daughter which was relevant to the jury's assessment of the defendant's state of mind and the reasonableness of his actions?

STATEMENT OF THE CASE

On May 11, 2016, appellant Mark Robert Volstromer was indicted in Richland County for murder. R. 934. On June 14, 2021, appellant was tried before the Honorable Deandra G. Benjamin and a jury. R. 1. April W. Sampson, Stephanie Taylor, and Samuel C. McGlothin represented the State. R. 1. Aimee J. Zmroczek and Sarah M. Austin represented appellant. R. 1. The jury convicted appellant. R. 914, l. 23 – 968, l. 8. Judge Benjamin sentenced appellant to thirty-five years' imprisonment. R. 923, l. 3 – 6. This appeal follows.

STANDARD OF REVIEW

The trial judge's decision is reviewed under the abuse of discretion standard. State v. Day, 341 S.C. 410, 535 S.E.2d 431 (2000).

ARGUMENT

In this self-defense case, the trial court erred in refusing to allow the defendant and his wife to inform the jury of their knowledge of the decedent's conviction for criminal sexual conduct and that the decedent had been hanging around with a man who molested the defendant's daughter, which was relevant to the jury's assessment of the defendant's state of mind and the reasonableness of his actions.

Introduction

Mark Volstromer's security system captured the audio and video of this shooting. (State's Ex. 46). While it captured the shooting and the decedent screaming, "I am the Devil," it did not capture the whole story of the decedent's threats and harassment of the Volstromers over the previous months. Nor did the jury get to know the whole story behind this shooting because the state successfully kept them from hearing that the Volstromers knew the decedent had a conviction for criminal sexual conduct and was hanging around with a man who molested the Volstromers' daughter when she was very young. R. 473, l. 9 – 475, l. 10.

Keith Pruitt Moves into the Volstromers' Neighborhood

Mark Volstromer ("Mark") lived on his property in rural Richland County since 1995. R. 669, l. 8 – 11. Mark owned a garage door installation business that he ran with his wife, Barbara Volstromer ("Barbara"). R. 667, l. 19 – 668, l. 20. Mark and Barbara had one child, KV, who was sixteen and lived with them. R. 556, l. 2 – 7.

At the beginning of 2015, the decedent Keith "Lanny" Pruitt ("Pruitt") moved into the neighborhood. R. 560, l. 16 – 561, l. 8. The first time the Volstromers met Pruitt, he came into their home with a beer in his hand and said he was going to cut down their trees. R. 561, l. 9 – 13. In front of Mark, he started calling Barbara "darling and sweetheart." R. 678, l. 14 – 22. Barbara

asked Mark to escort Pruitt out. R. 678, l. 14 – 22. Pruitt told Mark he need to put Barbara in her place. R. 605, l. 22 – 606, l. 1. Mark then learned that Pruitt used to be a Green Beret. R. 679, l. 5 – 14.

In February 2015, Barbara heard a commotion and went outside. R. 564, l. 24 – 565, l. 19. Pruitt was yelling and he and Barbara squabbled over Pruitt's dog. R. 565, l. 14 – 24. Pruitt told Barbara, "Come over here so I can hit you." R. 565, l. 21 – 24. Pruitt's dog came through the Volstromers' fence, jumped on Barbara, and fractured her ribs. R. 566, l. 3 – 9.

The Volstromers' property bordered on a church and in May 2015, they noticed a truck often parked in the church's lot. R. 566, l. 17 – 567, l. 20. The Volstromers walked over to the church's lot to get the license tag from the truck. R. 566, l. 17 – 567, l. 20. Pruitt came out holding a beer and yelled, "I'm the devil." R. 566, l. 17 – 567, l. 20. He told the Volstromers, "I'm going to rain hell down on you. You don't know who you are dealing with." R. 566, l. 17 – 567, l. 20. Barbara described him as "crazy." R. 566, l. 17 – 567, l. 20. They called the police and made a report. R. 567, l. 21 – 24.

The Volstromers were frightened enough that they installed a security system with cameras and a microphone. R. 571, l. 12 – 22. The system recorded twenty-four hours a day. R. 571, l. 12 – 22. The man who installed their system said nobody had ever asked for a microphone system except for the Volstromers. R. 513, l. 2 – 8.

In July 2015, Mark was playing in his yard with his grandson. R. 685, l. 5 – 689, l. 2. Mark looked up and saw Pruitt sitting in his work van. R. 685, l. 5 – 689, l. 2. Mark took his grandson into the house after Pruitt threatened him. R. 685, l. 5 – 689, l. 2. Mark described the threat as "distasteful" and "worrisome." R. 685, l. 5 – 689, l. 2.

In September 2015, the Volstromers called the police because people were riding four-wheelers down the dirt road beside their house shining floodlights into their cameras. R. 571, l. 23 – 572, l. 16. Pruitt again told Barbara she did not know who she was dealing with. R. 572, l. 11 – 22. The Volstromers decided to move. R. 573, l. 8 – 16. R. 698, l. 12 – 19.

In early December 2015, more floodlights were shown into the Volstromers' house. R. 576, l. 11 – 578, l. 8. Screenshots from the security system showed the lights from the vehicles. (Def. Ex. 25-30). On December 20, 2015, somebody rode by their house and said, "Die." R. 579, l. 15 – 19. The defense entered the video of this incident captured by the security system. (Def. Ex. 19). Mark heard gunshots the same night and that video was also entered into evidence. R. 694, l. 9 – 22. (Def. Ex. 20).

In 2006, before Pruitt moved into the neighborhood, Mark was attacked by dogs. R. 671, l. 19 – 673, l. 12. Mark bought a handgun because of the dog attack. R. 675, l. 6 – 7. He also took a concealed weapons permit class. R. 676, l. 8 – 10. Mark never fired the handgun before the shooting of decedent on December 27, 2015. R. 677, l. 13 – 25.

The Shooting

On the day of the shooting, the Volstromers had been watching the Carolina Panthers football game. R. 584, l. 1 – 16. Barbara went outside to take some pictures because she had a yard man coming the next day. R. 585, l. 20 – 586, l. 7. Mark stayed inside with their daughter. R. 585, l. 20 – 586, l. 7. Barbara took her gun and her camera. R. 587, l. 13 – 15.

The Volstromers' cameras and microphone captured their encounter with Pruitt and another man, Rick Holten ("Holten"). (State's Ex. 46) (Def. Ex. 24). The defendant's video expert combined two camera angles, the audio, and zoomed in on a single video Defendant's Ex. 24. R. 521, l. 16 – 22. The Court will notice that some of the action unfortunately happens behind a

watermark that says “CH1” which cannot be removed. R. 523, l. 9 – 16. (State’s Ex. 46) (Def. Ex. 24). When the video begins, Barbara can be seen leaning on their white fence to the left of the CH1 watermark. (State’s Ex. 46) (Def. Ex. 24).

Holten¹ drives a truck down the dirt road and stops beside Barbara. (State’s Ex. 46) (Def. Ex. 24). Pruitt is in the passenger seat. (State’s Ex. 46) (Def. Ex. 24). Holten and Barbara begin to argue about the property line. (State’s Ex. 46) (Def. Ex. 24). Pruitt tells Barbara it is not her property. (State’s Ex. 46) (Def. Ex. 24). Holten tells Barbara the fence she is leaning on belongs to him and that when he gets ready to clear “this fucking road,” the fence would need to be moved forty-five feet from the center of the road. (State’s Ex. 46) (Def. Ex. 24).

Holten tells Barbara, “I own this.” (State’s Ex. 46) (Def. Ex. 24). She responds, “You don’t own a goddamn thing.” (State’s Ex. 46) (Def. Ex. 24). Holten says, “You full of shit, bitch.” (State’s Ex. 46) (Def. Ex. 24). Pruitt tells Barbara, “You are a pretty woman.” (State’s Ex. 46) (Def. Ex. 24). They continue to exchange words and profanities. (State’s Ex. 46) (Def. Ex. 24).

Mark comes out of the house and responds, “No you don’t” to Holten’s assertion that he owns their property. (State’s Ex. 46) (Def. Ex. 24). Barbara backs away from the fence and Pruitt gets out of the truck and walks to the tailgate. (State’s Ex. 46) (Def. Ex. 24). Mark tells Pruitt, “Walk over here bud.” (State’s Ex. 46) (Def. Ex. 24).

Pruitt says, “I don’t want on your property. You know what I told you last time you talked to me?” (State’s Ex. 46) (Def. Ex. 24). “Remember. The road right there. You want the Devil? You got him.” (State’s Ex. 46) (Def. Ex. 24). “You think you a bad ass come over here?” (State’s Ex. 46) (Def. Ex. 24).

¹ Holten died from unrelated causes before the trial. R. 46, l. 11 – 16.

Pruitt opens a white cooler in the back of the truck. (State's Ex. 46) (Def. Ex. 24). He reaches into the cooler and then puts his hand behind his back. (State's Ex. 46) (Def. Ex. 24). Pruitt starts walking toward Mark and says, "I got something for you." (State's Ex. 46) (Def. Ex. 24). Pruitt opens his arms wide, saying, "I love it. Because I am the Devil." (State's Ex. 46) (Def. Ex. 24). Barbara says that Rick needs to take Pruitt away and Pruitt responds, "Yeah, he needs to take me away, you know why?"

Barbara continues to scream at Pruitt about the property. Pruitt says, "This ain't yours." (State's Ex. 46) (Def. Ex. 24). Mark takes his handgun out of his back pocket. (State's Ex. 46) (Def. Ex. 24). Pruitt says, "What you gonna do with that?" Mark responds, "I'm done." (State's Ex. 46) (Def. Ex. 24). Mark fires one time and Pruitt falls. (State's Ex. 46) (Def. Ex. 24). Holten drives off. (State's Ex. 46) (Def. Ex. 24). Pruitt died nearly instantaneously from the gunshot wound and was dead when the paramedics arrived. R. 154, l. 14 – 18. The time from the beginning of the recording to the shooting is approximately three-and-one-half minutes. (State's Ex. 46) (Def. Ex. 24).

Mark goes into the house and Barbara calls 911. (State's Ex. 46) (Def. Ex. 24). Pruitt's wife and Holten come back to Pruitt's body. (State's Ex. 46) (Def. Ex. 24). Barbara continues to exchange words with the crowd forming and reminds them that everything is being recorded. (State's Ex. 46) (Def. Ex. 24). Holten bends down and could have removed something from Pruitt's body. (State's Ex. 46) (Def. Ex. 24).

Neither Mark nor Barbara saw Pruitt with a weapon, but the hospital removed a knife from Pruitt's body. R. 461, l. 19 – 24. Mark testified that he thought when Pruitt reached into the cooler, he put something in his back pocket. R. 703, l. 14 – 19. Mark also thought he saw Pruitt put his hand behind his back while saying he was the Devil and that he "had something" for Mark.

R. 704, l. 7 – 14. Mark said, “Well, he had something on him. I’m sure he had a gun on him. He had to have.” R. 704, l. 17 – 20. The police never looked into the truck, claiming problems with chain of custody because it left the scene of the shooting and went a short ways down the road to the Pruitts’ house. R. 357, l. 13 - 358, l. 20. Pruitt was a convicted felon and his wife said he did not have any guns, but she owned somewhere between three and ten guns. R. 778, l. 4 – 779, l. 14.

Barbara testified that before Mark came, that she drew her own gun. R. 595, l. 22 – 596, l. 16. When she tried to cock it, she dropped the gun. R. 595, l. 22 – 596, l. 16. She then heard Mark shoot. R. 595, l. 22 – 596, l. 16. Barbara said she felt “terrorized” and that she thought Pruitt was going to come after her and that she was going to die. R. 602, l. 14 – 20. She said, “I was deathly afraid of that man.” R. 603, l. 4 – 8. Mark said, “It was either him or us. I mean, I was scared sh—like I said, I was pretty scared.” R. 705, l. 3 – 7.

The Volstromers’ Knowledge of Pruitt’s Prior Conviction

The Volstromers knew that Pruitt had been convicted of “second degree felony sexual offense, which is—which is rape.” R. 536, l. 13 – 16. Barbara’s testimony about what they knew of Pruitt’s conviction was proffered in camera. After Pruitt told them, “You don’t know who you are dealing with,” Barbara researched Pruitt in the available county records. R. 535, l. 14 – 536, l. 16. She saw that Pruitt was a sexual offender. R. 535, l. 14 – 536, l. 16. When asked why this was important to her, Barbara responded, “Because my daughter was sexually abused when she was four years old.” R. 536, l. 13 – 19. Barbara can be heard mentioning Pruitt’s criminal history on the 911 call. R. 464, l. 11 – 25.

Defense counsel submitted a written motion seeking to introduce the Volstromers’ knowledge of Pruitt’s prior conviction pursuant to Rules 404(a)(2) and 405(b), SCRE. R. 925,

928 (Court's Ex. 2, 3). Pruitt was convicted of Criminal Sexual Conduct in the second degree in 1989. Pruitt also had a conviction for Assault of a High and Aggravated Nature from 2000, but the Volstromers did not know about that conviction at the time of the shooting.² R. 925, 928 (Court's Ex. 2, 3).

The State argued the CSC conviction was too remote and not closely connected. R. 467, l. 4 – 468, l. 25. The State also argued there was no sexual component to the encounter with Pruitt. R. 467, l. 4 – 468, l. 25. Appellant argued:

So it will come out that victim's [sic] 16-year-old daughter was molested when she was a younger by a neighbor and that neighbor recently moved back into the neighborhood and was hanging out with Mr. Pruitt. He was sort of part of this group. So they—this is all going to the Defendant's state of mind and their fears.

R. 473, l. 9 – 16. A police report was on file, but because of their daughter's youth, the Volstromers elected not to prosecute the neighbor. R. 474, l. 22 – 475, l. 3. Defense counsel said that the neighbor had subsequently been convicted involving other victims. R. 475, l. 1 – 3. She stated, "[T]his is going to the Defendant and his family's state of mind and their fears, and this man is convicted of a violent crime of a sexual nature, which they have already been victims of." R. 475, l. 6 – 10. She linked Pruitt's conviction to him taking photographs of the Volstromers' daughter. R. 477, l. 14 – 20. She also linked Pruitt's conviction to him telling Barbara that she was a pretty woman from the truck on the day of the shooting.³ R. 477, l. 2 – 6.

The judge indicated that she would not allow testimony about the CSC conviction, but would allow the defense to proffer Barbara's testimony the next morning. R. 479, l. 12 – 480, l. 12. Judge Benjamin said she probably would have admitted testimony of the assault conviction if

² Appellant is not challenging the trial judge's ruling regarding this conviction.

³ Trial counsel quotes Pruitt as saying he thinks Barbara is cute, but appellate counsel's interpretation of the audio is that he tells Barbara she is a pretty woman.

the Volstromers knew about it, but reasoned that the CSC was not admissible because it was “a different kind of assault” and there was “no sexual allegation here.” R. 479, l. 12 – 480, l. 15. The court also said it was not necessary for Barbara to testify about her daughter being assaulted, but defense counsel responded, “That is why they feel like they need to protect themselves against these particular neighbors.” R. 481, l. 12 – 19. The next morning, Judge Benjamin stated she thought she had already ruled before Barbara’s testimony was proffered. R. 528, l. 25 – 529, l. 10. After the proffer, Judge Benjamin affirmed her prior ruling, stating, “It is too remote. There is no connection.” R. 546, l. 13 – 547, l. 19.

Legal Discussion

In order to accurately assess the state of mind and the reasonableness of Mark’s actions, the jury needed to hear about the Volstromers’ knowledge of Pruitt’s prior sexual assault conviction, especially given that their daughter was molested by a current associate of Pruitt’s. The jury could not understand the context of the video of the shooting without knowing this critical piece of information that was in Mark and Barbara’s minds. The trial court erred in accepting the State’s argument and keeping this vital information from the jury.

Rule 404(a)(2) of the South Carolina Rules of Evidence states, in relevant part: “Evidence of a person’s character or trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except . . . Evidence of a pertinent trait of character of the victim of the crime offered by an accused. . . .” Rule 404(a)(2), SCRE. “In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person’s conduct.” Rule 405(b), SCRE. Rape is a crime of violence and Pruitt’s CSC conviction is “a pertinent trait” offered by the accused. The CSC conviction was also specifically pertinent given Pruitt’s photographing the Volstromers’

daughter, her abuse at the hands of Pruitt's associate, and his sexual comment made to Barbara before he got out of the truck. Pruitt's unprovoked comments about being "the Devil" certainly called this association into the Volstromers' mind during the short, intense confrontation.

In a case decided long before the adoption of the South Carolina Rules of Evidence, the Supreme Court announced the basic test for admission of specific prior instances of violence by a decedent in a self-defense case:

The rule has long been established in this State that evidence of other specific instances of violence on the part of the deceased are not admissible unless they were directed against the defendant, or, if directed against others, were so closely connected in point of time or occasion with the homicide as reasonably to indicate the state of mind of the deceased at the time of the homicide, or to produce reasonable apprehension of great bodily harm.

State v. Amburgey, 206 S.C. 426, 429, 34 S.E.2d 779, 780 (1945) (internal citations omitted). This rule was cited with approval in 1996, in State v. Brown, 321 S.C. 184, 467 S.E.2d 922 (1996), and in 2000, in State v. Day, 341 S.C. 410, 535 S.E.2d 431 (2000).

Nothing in the Brown opinion indicates that the defendant had personal knowledge of the decedent's prior conviction for manslaughter. The Brown Court ruled that the twenty-three year-old conviction was properly excluded because it was too remote. In Day, nothing indicates that the defendant knew of the prior instance of violence at the time of the shooting in self-defense, but the Court held that it was error to exclude it because it was relevant to the reasonableness of Day's apprehension of violence from the decedent. The violent conduct was not directed at Day and occurred four months before the shooting.

State v. Mekler, 368 S.C. 1, 626 S.E.2d 890 (Ct. App. 2005), affirmed 379 S.C. 12, 664 S.E.2d 477 (2008), best applies to Volstromer's case because the defendant knew about the prior bad acts. The decedent in Mekler was Bubba, the husband of Mekler's friend, Robette. Mekler at 3-5, 626 S.E.2d at 891. Mekler testified that she was aware that Bubba had been convicted of

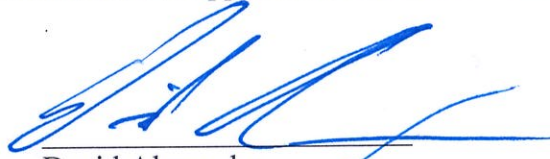
domestic violence, but the court would not allow her to testify that the conviction involved Bubba breaking the door of Robette's home. Id. at 12-14, 626 S.E.2d at 896-97. This Court held the trial judge erred in excluding this evidence. Id. The prior incident was admissible to show Bubba's state of mind and that Mekler "had a reasonable apprehension of great bodily harm from Bubba, an essential element of Mekler's claim of self-defense as well as her claim of defense of others."

Id.

Volstromer's knowledge of the prior CSC was relevant to his assessment of the danger from Pruitt. Like in Mekler, Volstromer relied on self-defense and defense of others. The State will point out that the conviction in Mekler was recent—less than three months prior to the shooting. While Pruitt's conviction is admittedly old, the facts of this case show that it was temporally important. Pruitt began hanging out with the specific person who molested the Volstromers' daughter. He made sexual comments to Barbara and claimed he was the Devil. The Volstromers suffered a campaign of harassment from Pruitt and others. This specific connection to the Volstromers refreshes the CSC conviction and makes it specifically relevant to Mark's decision-making and the threat he saw from Pruitt. The trial court erred in excluding this crucial information and this Court should reverse.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's conviction and remand for a new trial.



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This 4th day of November, 2022.

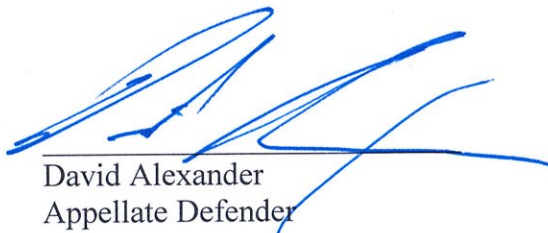
CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final 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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