

Dec 05 2022

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to Cherokee County
Court of Common Pleas

The Honorable R. Keith Kelly, Trial Judge

Appellate Case No. 2022-000085

NICHOLAS BONNER.....Petitioner.

v.

STATE OF SOUTH CAROLINA.....Respondent.

**INITIAL BRIEF OF RESPONDENT
PURSUANT TO WHITE V. STATE**

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ATTORNEYS FOR RESPONDENT

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STATEMENTS OF ISSUES

Petitioner's Statement of Issues

- I. Was the issue of whether the trial judge erred in ruling that a cooperating co-defendant witness could testify about prior bad acts preserved for appellate review when trial counsel failed to make a contemporaneous objection to the testimony?
- II. Did the trial judge err in ruling that a cooperating co-defendant witness could testify about prior bad acts?

Respondent's Counterstatement of Issues

- I. Was the issue of whether the trial judge erred in ruling that a cooperating co-defendant witness could testify about prior bad acts preserved for appellate review when trial counsel failed to make a contemporaneous objection to the testimony?
- II. Did the trial court abuse its discretion in finding that testimony of Appellant's prior bad acts was admissible because they established intent and any error in admitting the testimony was harmless?

STATEMENT OF THE CASE

In September 2012, the Cherokee County Grand Jury indicted Nicholas Bonner (“Appellant”) for trafficking in crack cocaine, more than 400 grams (2012-GS-11-00820) and trafficking in cocaine, more than 400 grams (2012-GS-11-00821). Appellant was represented by Candice Lapham, Esquire (“Counsel”). Assistant Solicitor Christopher M. Bain, Esquire, from the Seventh Circuit Solicitor’s Office, represented the State. On April 24, 2017, Appellant proceeded to a jury trial before the Honorable R. Keith Kelly. The jury found Appellant guilty of the lesser-included offense of trafficking in cocaine, 28-100 grams, on April 27, 2017. Appellant was sentenced to twenty years’ imprisonment. Appellant filed a motion to reconsider the sentence and a motion for a new trial on May 5, 2017. A motions hearing convened on May 19, 2017. Judge Kelly denied the motions on May 30, 2017.

Appellant filed a notice of appeal. On July 18, 2017, Appellant filed a motion to remand the case to the circuit court to resolve post-trial motions. The South Carolina Court of Appeals granted the motion and dismissed the appeal without prejudice on August 24, 2017. The remittitur was issued on September 15, 2017.

Appellant filed another motion for a new trial and a hearing on the motion was convened on November 8, 2017, before Judge Kelly. On December 5, 2017, Judge Kelly denied the motion. Appellant did not file a timely notice of appeal thereafter.

Appellant filed a PCR application on August 27, 2018. The evidentiary hearing was held on August 4, 2021, before the Honorable H. Steven DeBerry, IV. Susannah Ross, Esquire was Appellant’s attorney. William Ray, Esquire of the South Carolina Attorney General’s Office represented Respondent. The Court issued an order of dismissal granting belated appellate review and denying all other claims with prejudice on December 15, 2021.

STATEMENT OF FACTS

Testimony from Law Enforcement

On August 6, 2012, Prentiss Jeffries, a confidential informant for the Cherokee County Sheriff's Office ("CCSO"), told CCSO narcotics investigators Todd Parker, controlling agent, and Brandon Gardner, lead investigator, that a large shipment of cocaine arrived at Appellant's house. (App. 122-23, 140-44, 283-86; State's Trial Exhibit #2). Gardner obtained a search warrant based on the information. (App. 276-77). Police waited to execute the search warrant until Jefferies called Parker to confirm the shipment had arrived. (App. 282-83).

Gardner reached out to Mice Scruggs, narcotics officer with the City of Gaffney Police Department, and they put together a joint team between the county and city because of the number of people anticipated to be present at the home. (App. 347-48). Nick Federico, a CCSO narcotics officer, executed the search warrant on August 6, 2012. (App. 201-03, 288-29, 347-48). During the search, law enforcement discovered cocaine in an individual's pocket, about two ounces of crack cocaine in the oven, \$13,084 in cash in the top drawer of a nightstand a bedroom, \$615 in another bedroom, and \$1,250 in Appellant's pocket. (App. 203-08, 291-92, 294-98, 303-09). After the first search did not produce the large shipment expected, Parker was contacted by Jefferies, who clarified the shipment was across the street. (App. 310-11, 349).

Officer Ronnie Anderson, then with the Gaffney City Police Department, secured the residence during the search. (App. 233-34). While on scene, Detective Parker advised him that Jefferies reported that Petitioner's big drug shipment was across the street. Anderson spoke with Jefferies, who repeated the tip. (App. 234-35, 244-47). Anderson obtained a search warrant that he signed in front of the magistrate. (App. 246-47). The police executed the search warrant and found a red duffel bag inside of a trash can under the carport which contained over 400 grams of

cocaine and crack cocaine. (App. 209-10, 235, 240-41, 249-50, 349-50). Appellant was arrested on scene along with everyone else that was present. (App. 309). Agitated “because [Eric Lattimore] wouldn’t claim the drugs[,]” Appellant shoved Lattimore and the police broke up the confrontation. (App. 309-10).

Appellant gave a statement to Detectives Garner and Scruggs, claiming Lattimore came into the house looking for a scale, only to have the police raid the house. (App. 319-20, 351-52).

Testimony from the People in the House

Lattimore went to Appellant’s home on August 6, 2012, to buy a couple of cigarettes and a beer. (App. 151-52). While there, Lattimore witnessed Appellant send a person to retrieve bags from across the street to provide drugs to “[s]ome dude from out of town[.]” (App. 152). It was not the first time Lattimore saw Appellant dealing out of the house. (App. 161-62). Appellant produced scales, weighed what Lattimore described as “some white stuff like cocaine, crack cocaine[,]” and gave it to the man. (App. 152-53, 159). Appellant directed this man to return the bag of drugs across the street. (App. 153, 3-4). The police raided the house soon thereafter. (App. 159-60). While at the detention center, Appellant verbally abused Lattimore, and threatened to force him to take the fall. (App. 164-65). Lattimore gave written police statement consistent with his trial testimony. (App. 167-68).

Stephon Adams, Appellant’s acquaintance, testified he was smoking marijuana at Appellant’s house when the police arrived. (App. 254-55, 257). Adams saw Appellant and Lattimore exchange something unidentified, and then saw crack cocaine weighed in Lattimore’s presence. (App. 254, 258-60). Appellant said “there go the cops[,]” and at least six people, including Adams, fled out the back door. (App. 255-56). Adams was apprehended and arrested for trafficking crack cocaine. (App. 256). While the group, minus Lattimore, were transported in

the police van, Appellant asserted that the drugs belonged to Lattimore. (App. 260-61). Adams denied knowledge of the drugs across the street. (App. 264-65). In a written statement, Adams stated that Lattimore arrived at the house with the drugs. (App. 267-68).

Jarvis McCluney, Appellant's acquaintance, was at Appellant's house smoking marijuana on August 6, 2012. (App. 378-80). McCluney denied familiarity with drugs other than marijuana, but testified he saw Lattimore arrive and produce a hard, white substance. (App. 381-82). McCluney handed him one. (App. 382-83). McCluney denied seeing an exchange of drugs, but explained Lattimore came to the door and called Appellant outside, after which Lattimore came in and asked for a scale. (App. 384). Somebody yelled that the police arrived, and McCluney pocketed his scale and stepped through the door while Lattimore ran toward the kitchen. (App. 385). McCluney saw an argument between Appellant and Lattimore over Lattimore's demand that all present stick the drugs on a fourteen-year-old juvenile. (App. 385-86). McCluney denied knowledge about the drugs recovered from across the street. (App. 390-91). McCluney gave a statement to law enforcement consistent with his trial testimony, explaining that ten to fifteen minutes passed between Lattimore's request for a scale and the raid. (App. 392).

The Defense Case

Rodney Love, Appellant's friend, arrived at the house after the police raided it and testified that he saw law enforcement retrieve a red bag from the woods and bring it to Appellant's property. (App. 463-65). Love testified he observed Officer Anderson leave with Lattimore in custody, then return fifteen minutes later. (App. 468). The raid team converged on the abandoned house across the street and opened the trash can, celebrating their findings. (App. 468-69). Love testified that Appellant lived with his girlfriend at a different address, but visited

his mother, Gwen Bonner,¹ daily. (App. 471-72). Love testified Appellant's mother would never let people smoke in the house and could not explain why drugs were there. (App. 473-74). Love testified that the \$13,000 cash was in Gwen's "money drawer." (App. 487).

Ronda Norris, Appellant's ex and mother to one of his children, testified Gwen was acted maternal towards everyone and would not allow the activities in question in her home. (App. 490-94). Norris testified Appellant did not consume drugs and that she would not allow her children to be in that environment. (App. 495-96). Norris testified that "Gwen Bonner wasn't home at the time" when prompted to explain the recovered marijuana. (App. 499-500, 510). Norris testified she pulled up at the house after the raid. (App. 510-11).

Shakeia Davidson, Appellant's first cousin and Rodney's wife, testified the house was Gwen's and that people regularly gathered there. (App. 526-28). Shakeia was not present during the raid and was not aware of any gatherings at Gwen's home that day. (App. 527-29).

Rodney Davidson, Appellant's acquaintance, testified Appellant was typically at the home every weekend. (App. 517-22). Rodney asserted Appellant's mother did not allow drugs in her house and was surprised to hear that crack was in the oven. (App. 523-34). Rodney was not present during the raid. (App. 523).

Daphine Bonner, Appellant's aunt, testified Appellant visited the home daily. (Tr. 530-31). She testified Appellant's mother did not allow parties to be thrown at her house in her absence. (App. 533-34). Daphine declined anything unusual about the money. (App. 534-35).

Todd Fernanders, a lifelong friend of Appellant's family, happened upon the raid while returning from bible school. He testified that he saw an officer recover a bag from city property and drop it near a big tree between his sister's home and the raided house. (App. 546-50).

¹ Gwen Bonner was deceased at the time of trial. (App. 494).

Latonya Smith, the older sister of one of the arrested juveniles, learned of her younger brother's arrest and promptly went to the scene with her mother and cousin. (App. 573-74). Federico and Gardner let them into the house to meet with the handcuffed juvenile. (App. 574-76). Smith learned that Lattimore tried to pin the drugs on her brother. (App. 576-77).

Chris Bonner, Appellant's cousin, was near the tree when Lattimore arrived and asked for a scale; Chris denied knowledge of a scale and Lattimore went into the house. (App. 578-80). Chris did not see what occurred inside the house, and testified he never saw Lattimore and Appellant leave. (App. 580-81). Chris denied drug activity was common in the house and testified that he never saw Appellant involved in drug activity. (App. 581). Chris was arrested during the raid. (App. 586-87). As the police brought everybody out of the house, Lattimore said "put the drugs on the young guy, and [Appellant] hit him in his mouth." (App. 587).

Appellant testified at trial. Appellant testified he visited his mother daily, who was in poor health and could not be around smoking. (App. 613). Appellant listed his mother's home as his own on all paperwork to ensure that she received the mail. (App. 613-14). Appellant testified the money found was his mother's, who worked for nearly forty years after inheriting the home from her father, such that she was able to save up a large amount of cash. (App. 614-15). Appellant admitted to smoking marijuana when he was younger. (App. 615). On the incident date, Applicant testified Lattimore pulled up, asked Chris for a scale, and came in and asked him "Nick, do you got a weed scale?" (App. 615-16). Appellant said no and Lattimore obtained one from McCluney. (App. 616). Appellant testified that when he saw Lattimore's dope, he told them to leave, only to have law enforcement raid the house. (App. 616). Lattimore threw his drugs in the oven and fled towards the back door, which was nailed shut. (App. 617). Lattimore insisted Appellant "put the drugs on the 14 year old[,] " which prompted Appellant to strike him. (App.

617-18). Appellant explained the \$2,500 in his pocket was from selling a four-wheeler to Gus Logan, who testified to the same. (App. 619-20).

On cross-examination, Appellant denied anybody smoked marijuana at the house and noted the absence of paraphernalia in the pictures of the home. (App. 625). Appellant denied knowledge about his mother's cash drawer. (App. 625-26). Appellant claimed the cash in the drawer was \$35,000 and implied the police underreported the amount to steal it. (App. 631-34). Appellant claimed no valid search warrant was served during the raid, and that Officer Federico "was reading blank pieces of paper[.]" (App. 634-37). Appellant gave a statement to the police that Lattimore entered the home, asked for a scale, indicated that he wanted to sell crack, and that the police came right after. (App. 640).

Nickcos Smith testified he was present when Lattimore entered. (App. 697-98). A few minutes later, Ronnie Littlejohn entered and threw marijuana down on the table while Lattimore looked out the back window. (App. 698, 701). Smith denied seeing Jefferies that day and anybody from North Carolina bring drugs to Lattimore. (App. 698). Smith recalled Lattimore producing the crack and asking McCluney for the scale, and that Appellant told him to leave. (App. 699-701). During the raid, Lattimore threw his crack into the oven. (App. 699).

DeeGee Bonner, Appellant's sibling, testified Appellant visited his mother often and denied drug transactions occurred in the home. (App. 705-06). She clarified the money was her mother's savings and denied ever seeing Appellant use, buy, or transport drugs. (App. 706-11).

Stacy Covington, Appellant's sister, testified the home was his mother's, where his mother saved almost thirty thousand dollars. (App. 714-18). She denied seeing Appellant use, sell, or buy drugs and stated their mother never allowed drugs in the house. (App. 718-19, 726).

ARGUMENT

I. The issue of whether the trial judge erred in ruling that a cooperating co-defendant witness could testify about prior bad acts was not preserved for appellate review because trial counsel failed to make a contemporaneous objection to the testimony.

This issue is not properly preserved on appeal. A ruling *in limine* is not a final ruling on the admissibility of evidence. *State v. Griffin*, 339 S.C. 74, 528 S.E.2d 668 (2000); *State v. Hughes*, 336 S.C. 585, 521 S.E.2d 500 (1999). Generally, a motion *in limine* seeks a pre-trial evidentiary ruling to prevent the disclosure of potentially prejudicial matter to the jury. *See State v. Floyd*, 295 S.C. 518, 369 S.E.2d 842 (1988). A pre-trial ruling on the admissibility of evidence is preliminary and is subject to change based on developments at trial. *Id.* Unless an objection is made at the time the evidence is offered and a final ruling made, the issue is not preserved for review. *State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993).

Here, Appellant pursued a pre-trial hearing regarding admissibility of prior bad acts. Lattimore was the third witness called at trial, after opening arguments. This included an opening statement from the State, where it was announced Appellant was on trial for drug trafficking and the process leading up to the bust was described to the jury, along with the contemporaneous identification of the most notable State witnesses. (App. 105-06). Thereafter, the confidential informant testified regarding their participation in the raid. (App. 115-19, 123-25). After the confidential informant testified, the officer using the confidential informant testified concerning the raid and execution of the search warrant. (App. 138-41). Thus, because the objection made during the motion *in limine* hearing was not renewed and the finding was not final, this issue was not preserved for appellate review.

II. The trial court did not abuse its discretion in finding that testimony of Appellant's prior bad acts was admissible because they established intent and any error in admitting the testimony was harmless.

Appellant contends that the trial court erred in permitting a cooperating co-defendant testify about prior bad acts. If this issue is preserved, Respondent contends the convictions should be affirmed because the testimony was admissible and, even if not admissible, the testimony was harmless.

Evidence of a defendant's crimes, wrongs, or acts is generally not admissible. Rule 404(b), SCRE. South Carolina courts view a defendant's previous distribution of drugs as a prior bad act. *Id. See also State v. Bostick*, 307 S.C. 226, 414 S.E.2d 175 (Ct. App. 1992) (finding that testimony of a defendant's prior drug distribution acts constituted prior bad acts). However, "[i]n the context of a criminal case, we have noted that while evidence of other crimes is generally inadmissible to show criminal propensity or to demonstrate that the accused is a bad individual, evidence of other crimes is admissible if necessary to establish a material fact or element of the crime charged." *In re Corley*, 353 S.C. 202, 205-06, 577 S.E.2d 451, 453 (2003).

A defendant's prior bad acts may be admitted showing motive, identity, existence of a common scheme or plan, the absence of mistake or accident, or intent. *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923). To be admissible under this exception, "there must be a logical relevance between the acts in question and the purpose for introduction." *State v. King*, 349 S.C. 142, 153, 561 S.E.2d 640, 645 (Ct. App. 2002). Evidence of prior drug distribution must be clear and convincing before it can be admitted. *State v. Dickerson*, 341 S.C. 391, 399, 535 S.E.2d 119, 123 (2000). Additionally, "pursuant to Rule 403, SCRE, the prejudice resulting from the admission of this evidence must be outweighed by its probative value." *King*, 349 S.C. at 153, 561 S.E.2d at 645. When the admissibility of prior bad acts evidence turns on the credibility of

conflicting witnesses, it should not be excluded because credibility is an issue solely reserved for the jury. *Id.*

The South Carolina Supreme Court explained application of the intent exception from *Lyle* in two drug cases. The Supreme Court noted, “We have held that evidence of a prior drug transaction is relevant on the issue of intent when the defendant has been charged with possession of a controlled substance with intent to distribute.” *State v. Wilson*, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001) (citing *State v. Gore*, 299 S.C. 368, 384 S.E.2d 750 (1989)). In *Gore*, the Court held that evidence of prior sales by defendant was admissible on the issue of intent where the prior sale occurred one month before the charged offense. *Gore*, 299 S.C. at 370, 384 S.E.2d at 751 (“The evidence that appellant sold cocaine from the trailer on two occasions only one month earlier tends to establish his intent regarding the cocaine in his possession at the time in question.”).

Similarly, in *Wilson*, the Court held evidence of a prior drug transaction was relevant on the issue of intent when the prior sales occurred only a few days earlier. *Wilson*, 345 S.C. at 7, 545 S.E.2d at 830. The Court also relied on circumstantial evidence to prove intent. *Id.* (finding the amount of baggies and cash found in hotel room, evidence of flushing before police entered the room, and testimony that defendant himself did not smoke crack was properly admitted by the trial judge to prove intent of prior bad acts exceptions).

Here, this testimony was admissible to establish intent. Specifically, Lattimore’s testimony consisted of him stating that he spent time at Appellant’s home on several occasions and, based upon his observations, a typical day consisted of a lot of people using and selling drugs. (App. 160). Additionally, he testified that he observed many crack and cocaine deals taking place while there and that he saw cocaine in the home every single time he has been there.

(App. 161-62). He testified that most people only stay at the house as long as they need to get what they want, which is typically a short period of time. (App. 161).

As the State argued during the pre-trial motion, the testimony went towards the intent exception under *Lyles* because “aiding and abetting is a major element for trafficking crack cocaine and cocaine.” (App. 90-91). The State also argued that this testimony went towards absence of mistake or accident that Petitioner was just merely present that day, as well as common scheme or plan, regarding Petitioner’s statement to Lattimore that someone was driving down from North Carolina to conduct a drug deal. (App. 91). Thus, the trial court correctly found that the testimony was admissible because it goes to an essential element, falling within the intent exception. (App. 93). Additionally, because the testimony was specifically regarding an essential element in the case, was rooted in very similar prior incidences in the same location, and because the State’s case related on circumstantial evidence, this testimony was extremely probative, and that probative value outweighed the prejudice. *Id.* at 8, 545 S.E.2d at 830 (establishing that evidence of a prior drug sale two days earlier at the same location was especially probative, because the State’s case relied upon circumstantial evidence to prove intent). Thus, this testimony was admissible.

Even if this testimony was not admissible, the impact was harmless because of the substantial evidence against Appellant. Uncontroverted testimony from both the State’s and the defense’s witnesses showed Appellant either lived at the house or was there daily. (App. 254-55, 378-80, 530-31, 613). Several witnesses’ testimonies support the jury’s finding that he was selling, or at the very least, aiding and abetting the sale of narcotics from the house. (App. 122, 152-53, 161-62, 254-56, 384-86). Numerous individuals inside the home were found to be in possession of narcotics, paraphernalia and large sums of cash were found in the home and on

Appellant's person, Lattimore stated that Appellant was responsible for the operation, and police claimed that they were informed of the operation through Jeffries. (App. 151-53, 161-62, 203-10, 235, 240-41, 249-50, 254-56, 276-77, 291-98, 303-10, 310-11, 349-50, 381-85, 615-17). Thus, even if the testimony was inadmissible, the impact was harmless. Accordingly, relief should be denied on this ground.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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