STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
The Honorable Debra R. McCaslin, Circuit Court Judge

Appellate Case No. 2022-000476

THE STATE, Respondent,

v.

KELSEY NICOLE SPURLOCK Appellant.

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

AMBREE M. MULLER
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

S. R. HUBBARD, III.
Solicitor, Eleventh Judicial Circuit

205 E. Main St.
Lexington, SC 29072
(803) 785-8352

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial judge did not abuse his discretion by preventing Appellant from cross-examining Co-defendant about his pending murder charge and about the exposure he faced for the trafficking charge for which he was being tried.

STATEMENT OF THE CASE

Appellant was indicted by the Lexington County Grand Jury for trafficking methamphetamine (28g-100g) and second-degree burglary (non-violent). Appellant proceeded to jury trial on September 13-16, 2021, before the Honorable Debra McCaslin. Appellant was tried jointly with her co-defendant, Jake Robert Fredrickson ("Co-defendant"). Appellant was represented by Stephen Story and Co-defendant was represented by Tivis Sutherland. The jury found Appellant guilty of trafficking methamphetamine (28g-100g) and the lesser-included third-degree burglary. Appellant was sentenced to seven years for the trafficking charge and two days for the third-degree burglary, with the sentences to run concurrently and credit for two days' time served. The jury found Co-defendant not guilty of trafficking methamphetamine (28g-100g) and guilty of failure to stop for a blue light, and a mistrial was declared on the burglary charge. Co-defendant was sentenced to three years' incarceration on the failure to stop charge.

STATEMENT OF FACTS

On October 3, 2019, Jake Fredrickson ("Co-defendant") picked up Kelsey Spurlock ("Appellant") in his truck and they drove around aimlessly until they came across a dirt road in Gaston, South Carolina. (Tr. 276-277). Appellant told Co-defendant that she lived down the road and that she wanted to check the mail and grab some things. (Tr. 277). Co-defendant forced the back door open because Appellant had "forgotten her key" (Tr. 278). The landlord's father who lived behind the mobile home approached them and told them that they were not allowed to be there, and that he was calling the police. (Tr. 129). Appellant and Co-defendant left shortly after. (Tr. 280).

Police responded to a burglary in progress call and observed Co-defendant's vehicle coming from the dirt road where they were advised a burglary had taken place. (Tr. 81). Once police were behind the truck, Co-defendant fled, resulting in a high-speed chase involving multiple police departments and reaching speeds between 70 and 90 miles per hour. (Tr. 82-90). After crashing into some power lines, Co-defendant fled the vehicle on foot and Appellant remained in the vehicle. (Tr. 90-92). Police apprehended Co-defendant shortly thereafter attempting to hide in a culvert, from which police had to pull him out. (Tr. 95-96). Co-defendant and Appellant were placed in the back of a police car and taken to jail. (Tr. 199).

Prior to towing Co-defendant's truck, police found several items in plain view inside the cab, including the following: an uncrushed pack of cigarettes on the seat with a small baggie of crystal substance; an open cooler bag on the floor between the driver and passenger seats containing a larger bag of crystal substance; mail from Appellant's old address; and a sheet of paper regarding Co-defendant's pending attempted murder charge in Lexington County. (Tr. 99-102, 120-123, 146-151).

During the trial, immediately prior to Co-defendant's testimony, Appellant notified the trial court of her desire to cross examine Co-defendant regarding his exposure to both his attempted murder charge, which was pending at the time of his arrest, as well as the trafficking methamphetamine (28g-100g) charge for which he was currently on trial. (Tr. 261). Appellant argued cross-examination of Co-defendant on these matters would show bias and that his true motive for running from police was not because he was driving with a suspended license, but because the drugs found in the car belonged to him. (Tr. 261-264). The State was "adamantly opposed to [Co-defendant] being questioned in any form or fashion, unless he were to open the door to it, about any pending charges he has in this jurisdiction or any other jurisdiction that doesn't fall under some rule of evidence that would make them admissible." (Tr. 263). The trial court ruled that "I don't know of any rules of evidence that it would fall under and any other case law, I did the 403(b) analysis, and I can't find anything that would be more prejudicial. I'm going to deny it..." (Tr. 263-264). Co-defendant took the stand at trial and testified that he did not know anything about the drugs found in his truck and that he ran because his license was suspended. (Tr. 283).

STANDARD OF REVIEW

"In general, the admission or exclusion of evidence is a matter left to the sound discretion of the trial court, whose ruling will not be reversed on appeal absent an abuse of that discretion." Matter of Campbell, 427 S.C. 183, 190, 830 S.E.2d 14, 18 (2019). Likewise, the general range and extent of cross-examination of a witness is within the sound discretion of the trial judge and the exercise of his discretion is not subject to review except in the case of manifest abuse or injustice. State v. Maxey, 218 S.C. 106, 62 S.E. 2d 100 (1950). "An appellate court will not disturb a trial court's ruling concerning the scope of cross-examination of a witness to test his or her credibility, or to show possible bias or self interest in testifying, absent a manifest abuse of discretion." Yoho v. Thompson, 345 S.C. 361, 365, 548 S.E.2d 584, 585 (2001). "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." Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "To warrant the reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." State v. Commander, 396 S.C. 254, 263, 721 S.E.2d 413, 418 (2011).

ARGUMENT

The trial judge did not abuse his discretion by preventing Appellant from cross-examining Co-defendant regarding his pending murder charge and the exposure that he faced for the trafficking charge for which he was being tried.

Appellant argues the trial judge erred in preventing her from cross-examining Co-defendant regarding his exposure for the trafficking in methamphetamine charge for which he was being tried, and regarding an unrelated pending attempted murder charge, where Co-defendant asserted throughout his trial testimony and closing argument that the reason he fled from police was because he did not want to go to jail due to his driver's license being suspended. This argument lacks merit for multiple reasons. First, the attempted murder charge was not admissible as substantive evidence and did not fall into any exceptions provided by the rules of evidence. Second, both the attempted murder charge and the potential exposure Co-defendant faced were irrelevant to the guilt or innocence of Appellant or Co-defendant on the charges for which they were being tried and lacked impeachment value. Third, even if it was relevant, allowing cross-examination regarding the murder charge and the potential exposure would have been more prejudicial than probative. This Court should affirm.

Confrontation Clause

"The Sixth Amendment rights to notice, confrontation, and compulsory process guarantee that a criminal charge may be answered through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence." State v. Mizzell, 349 S.C. 326, 330, 563 S.E.2d 315, 317 (2002). The Sixth Amendment is applicable to the states through the Fourteenth Amendment. Id. The confrontation clause provides that "in all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him . . ." U.S. Const. Amend. XIV; State v. Gracely, 399 S.C. 363,

372, 731 S.E.2d 880, 885 (2012). The Confrontation Clause guarantees a defendant the opportunity to cross-examine a witness concerning bias. State v. Williams, 432 S.C. 515, 854 S.E.2d 166 (Ct. App. 2021). "A defendant demonstrates a Confrontation Clause violation when he is prohibited from 'engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias...from which jurors...could draw inferences relating to the reliability of the witness.'" State v. Clark, 315 S.C. 478, 481, 445 S.E.2d 633, 634 (1994).

The trial judge retains discretion to impose reasonable limits on the scope of cross examination. See Mizzell. "The Confrontation Clause does not . . . prevent a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness. On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, witness' safety, or interrogation that is repetitive or only marginally relevant." State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994).

Murder Charge

Appellant argues that the trial judge erred in not allowing her to cross-examine Co-defendant about a Murder charge pending against him at the time of the incident. The trial judge correctly excluded the evidence because it was not admissible under the rules of evidence. "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." Rule 404(b), SCRE. "To be admissible, a bad act must logically relate to the crime with which the defendant has been charged." State v. Fletcher, 379 S.C. 17, 23, 664 S.E.2d 480, 483

(2008). "If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing." Id. Even if prior act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE.

Further, the pending charge not admissible under Rule 609, SCRE, because it is not a conviction. Pursuant to Rule 609(a)(1), SCRE, prior **convictions** punishable by more than one year's imprisonment "shall be admitted" for impeaching the credibility of a defendant who testifies if "the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused." Rule 609(a)(1), SCRE (emphasis added). Because Co-defendant had not been convicted of the attempted murder charge, it was not admissible as evidence of a prior conviction, and Appellant failed to prove by clear and convincing evidence that Co-defendant was guilty of the charge.

Furthermore, evidence of the pending attempted murder charge was not probative for impeachment purposes. It added nothing to Appellant's arguments that Co-defendant fled the vehicle because he possessed methamphetamine, rather than to avoid arrest for other criminal matters. Evidence of the attempted murder charge would only have served to introduce impermissible character evidence and raised the danger that the jury would have based its verdict on an improper basis. Therefore, the trial judge did not err in preventing Appellant from cross-examining Co-defendant about his pending Murder charge.

Potential Exposure for trafficking charge

Appellant also wanted to cross examine Co-defendant on the potential exposure that he faced on the current charge of trafficking. The potential exposure that Co-defendant faced on the trafficking charge was not relevant to the guilt or innocence of Co-defendant or Appellant.

"Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Rule 401, SCRE. "Evidence which is not relevant is not admissible." Rule 402, SCRE. Appellant argues that the potential exposure was relevant to show that despite co-defendant's testimony that he ran from police because his license was suspended, it was for other more probable reasons that would weigh on his credibility.

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. "Probative value is the measure of the importance of that tendency to the outcome of the case." State v. Gray, 408 S.C. 601, 610, 759 S.E.2d 160, 165 (Ct. App 2014). "Unfair prejudice does not mean the damage to a defendant's case that results from legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." Id. 408 S.C. at 616, 759 S.E.2d at 168. Here, allowing the cross-examination regarding the pending murder charge and the potential exposure Co-defendant faced would have been more prejudicial than probative.

In State v. Mizzell, an alleged co-conspirator was charged with the same offense as the defendant and testified as an adverse witness. State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002). The Court held that the defendant should have been allowed to cross-examine the witness regarding his possible exposure because the witness may have felt that the quality of his testimony would result in more lenient treatment by prosecution. Id. Similarly in State v. Gracely, the court held that "the fact that a cooperating witness avoided a mandatory minimum

sentence is critical information that a defendant must be allowed to present to the jury." State v. Gracely, 399 S.C. 363, 374-375, 731 S.E.2d 880, 886 (2012).

Unlike these two cases, here, Co-defendant was not a cooperating witness for the State. He was being tried at the same time and did not receive any leniency, nor was he testifying because he took a deal from the State. Here, by cross-examining Co-defendant on the possible exposure he faced, it would not show bias of Co-defendant, but indirectly tell the jury the possible exposure that Appellant also faced in hopes that the jury would give her leniency. "The function of the jury is to determine whether a defendant is guilty or not guilty. The rule in this State is that ordinarily the jury is not concerned with the punishment fixed by law, nor with the discretion of the court in deciding upon the sentence." State v. Brooks, 271 S.C. 355, 358-359, 247 S.E.2d 436, 438 (1978). Therefore, the trial judge did not abuse his discretion by limiting the cross-examination of Co-defendant.

Harmless Error

If this court finds that the trial judge's limiting of cross-examination of Co-defendant was a violation of Appellant's Sixth Amendment rights, it still isn't reversible error. "A violation of the defendant's Sixth Amendment right to confront the witness is not *per se* reversible error." Graham at 386, 444 S.E.2d at 528. To determine whether the violation of the Confrontation Clause constituted harmless error the court must apply the five-factor test set forth in Delaware v. Van Arsdall, 475 U.S. 673 (1986):

> (1) The importance of the witness's testimony in the prosecution's case, (2) whether the testimony was cumulative, (3) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, (4) the extent of cross

examination otherwise permitted, and of course, (5) the overall strength of the prosecution's case.

Van Arsdall, 475 U.S. at 684.

Co-defendant was not a witness for the State. Co-defendant testified in his own defense that he picked up Appellant and they drove to her house to get some of her items. When they were told they could not be there, they left and shortly after were followed by police. The State presented independent evidence that Co-defendant fled and engaged police in a high speed chase involving multiple departments and reaching speeds between 70-90 miles per hour. (Tr. 82-90). After crashing into power lines, Co-defendant decided to flee the vehicle while Appellant remained in the vehicle. (Tr. 90-92). Co-defendant was found soon after by law enforcement attempting to hide in a culvert, from which police had to pull him out. (Tr. 95-96). Co-defendant and Appellant were placed in the back of a police car and taken to jail. (Tr. 199).

The only difference that Co-defendant's testimony added was that he was not aware of any drugs in his truck and that he ran because he had a suspended license. Appellant wanted to cross examine Co-defendant on his pending murder charge and the potential exposure he faced to contradict Co-defendant's testimony that he only ran because he had a suspended license, but because the drugs in the vehicle were his and he ran because he faced much higher consequences. While Appellant could not specifically cross-examine Co-defendant on the potential exposure that he faced for the trafficking charge for which he was on trial, the trial judge did allow an extensive cross examination. Appellant's counsel was allowed to question Co-defendant on the 47 days of time served that he spent in jail on the suspended license charge. (Tr. 285). Appellant's counsel then went step by step through the high-speed chase that Co-defendant took police on. (Tr. 285-286). At the conclusion of the detailed car chase questioning,

Appellant's counsel questioned whether Co-defendant did all of that because his license was suspended. (Tr. 287).

The State then conducted an extensive cross-examination asking about the high-speed car chase. (Tr. 287-322) The Solicitor asked Co-defendant "Did you think when you started to run that this DUS, you know, potential offense is worth everything that you were doing to avoid it?" (Tr. 312). The Solicitor further questioned Co-defendant about why he fled the vehicle after the car chase ended. The solicitor asked: "Did you think a DUS was worth getting shot?" (Tr. 313). The Solicitor also questioned him about whether he had previously run because he was driving under suspension to which he answered that he did not run the previous times because he was in his mother's vehicle and did not want to destroy her property. (Tr. 315-16). Finally, the Solicitor asked: "Are you sure the reason why you weren't; running was because of the trafficking level of methamphetamine in the car and that you knew you were just coming from a burglary when they tried to stop you? That wasn't why you were running?" (Tr. 317). This extent of cross-examination was exactly what Appellant wanted to come from cross examining Co-defendant on the murder charge and potential exposure he faced. Finally, Appellant was found in the vehicle within reach of the methamphetamine. Even if this court finds that limiting the cross-examination of Co-defendant was error, it was harmless. Therefore, the trial court's decision should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgments and convictions of the lower court should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

AMBREE M. MULLER
Assistant Attorney General

S. R. HUBBARD, III.
Solicitor, Ninth Judicial Circuit

205 E. Main St.
Lexington, SC 29072
(803) 785-8352

BY: _____
AMBREE M. MULLER
Bar # 104213

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 779-8477

ATTORNEYS FOR RESPONDENT

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PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Breen Richard Stevens, Esquire, counsel of record for the Appellant by electronic mail to the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served.
This 30th day of May, 2023.

Anne Mueller

Anne A. Mueller
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727