

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County

Letitia H. Verdin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOHN J. DAY,

APPELLANT

APPELLATE CASE NO. 2012-211970

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred by failing to declare a mistrial after the State's witness violated the Court's pretrial ruling that evidence of appellant's prior conviction was inadmissible?

STATEMENT OF THE CASE

On August 16, 2011, John Day ("Day") was indicted for criminal domestic violence of a high and aggravated nature. On April 19-20, 2012, Day was tried in Greenville County before the Honorable Letitia H. Verdin and a jury. R. 1. Brian Johnson represented Day. R. 1. Charles Bondurant represented the State. R.1. The jury convicted Day. R. 169, l. 20 – 170, l. 5. Judge Verdin sentenced Day to eight years' imprisonment, with the balance suspended upon the service of five years' imprisonment and three years' probation. R. 175, ll. 19 - 25. On April 27, 2012, Day filed and served his Notice of Appeal. This appeal follows.

ARGUMENT

The trial court erred by failing to declare a mistrial after the State's witness violated the Court's pretrial ruling that evidence of appellant's prior conviction was inadmissible.

Relevant Facts

John Day graduated from high school in West Virginia and joined the Marine Corps. R. 138, ll. 6 – 17. Day worked on Marine One, which is the president's helicopter. R. 139, ll. 1 – 8. He provided presidential security on Marine One during President Bill Clinton's administration. R. 139, ll. 1 – 8. After receiving an honorable discharge, Day worked at the South Carolina Department of Corrections and held several jobs in manufacturing. R. 139, l. 12 – 141, l. 8.

In October 2009, Candice Stanley ("Stanley"), Day's girlfriend, moved into his home. R. 143, ll. 1 – 7. On June 30, 2010, Day came home from work and his neighbor told him that Stanley had fallen on the back porch while chasing her dog. R. 144, ll. 11 – 19. Stanley showed Day scratches on her arm and leg. R. 144, ll. 22 – 24. The couple got into an argument because Stanley felt that Day was not sufficiently concerned. R. 145, ll. 2 – 7. Stanley declined Day's offer to take her to the doctor. R. 145, ll. 2 – 7.

On July 4, 2009, the couple got into another argument. R. 147, ll. 5 – 23. Day told Stanley that she needed to move out of his house. Tr. 189, ll. 11 – 23. Day testified that he "just wanted it to be over" and told Stanley to "pack her stuff and leave." R. 148, ll. 2 – 3. After coming home from work on July 6, 2009, Day was arrested for criminal domestic violence of a high and aggravated nature. R. 148, ll. 13 – 16. While Day was in jail, Stanley "cleaned [his] checking account out and got some tattoos." R. 98, ll. 15 – 16.

Stanley gave several different versions of these events. On June 30 – the same day that a neighbor told Day that Stanley fell down the stairs – Stanley told their roommate, Robert Bostwinck, that she had fallen down the stairs. R. 92, ll. 7 – 18. Bostwinck did not notice any injuries on Stanley. R. 110, ll. 7 – 12. After moving out of Day's house and in with her best friend and her best friend's mother, she told them that Day hit her with a hammer. R. 36, ll. 2 – 15. The mother called the police. R. 36, ll. 16 – 21. Stanley's statement to the police resulted in Day's arrest. Bostwinck testified at trial that Day told him he had hit Stanley with a hammer, but admitted that he only told this to the police after they threatened to arrest him if he knew anything about it. R. 104, l. 11 – 106, l. 19. Bostwinck admitted that he had a prior record from Florida for grand theft auto, criminal mischief, and assault and battery with the adjudication withheld unless he committed another crime. R. 99, l. 19 – 100, l. 7; R. 106, ll. 20 – 24.

On July 19, 2010, Stanley wrote Day a letter while he was in jail. In the letter, Stanley wrote:

Baby, you know that I fell on the front porch at the house and cut my leg and arm. I'm so sorry that I lied on you and got you locked up. I just wanted you to hurt as bad as I did when I thought you were cheating on me. You know what really happened and know you did nothing wrong.... I didn't mean to take all of your money either and I will pay it back to you.... I love you and I miss you very much.

R. 54, ll. 1 – 18. Stanley then wrote Day another letter while he was in jail. This letter stated:

I got an appointment set for Wednesday to sign that paper. Now, if this works out then we're starting out brand new. I want it to be like we never met before. You will tell me everything... about the beginning to end and no... bullshit. I want to know who all you cheated on and who it was with, all of your kids and their moms and no sex until a few months later.... There is so much... shit you have lied to me about. And, yes, I do believe

you did cheat on me with Jennifer, Michelle, Shay, Tammy, and Candy.
There's too much evidence that you cheated in the past, why not do it again.

R. 54, l. 25 – 98, l. 4. Stanley signed this second letter, “Love, Candice.” R. 56, l. 4. The “paper” that Stanley referenced in this letter was an affidavit not to prosecute. R. 67, ll. 8 – 10. She signed it on July 30, 2009, while Day was still in jail. R. 67, ll. 8 – 23. The affidavit stated that Stanley had “not been threatened nor promised anything to request the dismissal of this warrant.” R. 69, ll. 8 – 9. In neither letter did Stanley say anything about Day hitting her with a hammer. R. 56, ll. 17 – 22.

After Day got out of jail, Stanley and Day got back together. R. 43, ll. 22 – 25. They were together for a year and a half. R. 44, ll. 3 – 6.

Stanley claimed at trial that on June 30, 2009, the couple got into an argument and Day hit her with a hammer. R. 29, ll. 17 – 30. That morning, the couple had been to magistrate’s court for a trial on a criminal domestic violence charge against Day. R. 4, l. 25 – 6, l. 25. Stanley claimed that the argument was a result of Day’s unhappiness with her testimony. R. 27, ll. 15 – 17. She claimed that Day told her that if he got in trouble again that she would “be leaving in a body bag.” R. 27, ll. 18 – 22. She claimed that, from jail, Day coerced her into writing the letter claiming that she fell on the front porch and dropping the charges. R. 37, ll. 10 – 16.

Prior to trial, the State informed the court that it wanted to introduce the evidence of Day’s domestic violence conviction. R. 4, l. 25 – 6, l. 25. Judge Verdin properly found that evidence of the conviction was inadmissible. R. 8, l. 5 – 14, l. 5. She found that evidence of the prior charge was unfairly prejudicial after conducting a Rule 403 analysis. R. 9, ll. 2 – 4. Judge Verdin believed the similarity of the charge would unfairly prejudice

Day. R. 8, ll. 5 - 20. The State argued that the evidence was necessary to its case to prove motive. R. 10, l. 25 – l. 11. The trial judge stated:

You want to talk about this court case as a motive, as the motive for this. But now, now what you're asking to do is use this case to, in some way, prove elements or to convince the jury of the truthfulness of this victim here today. **I'm not going to allow you to enter any kind of conviction or anything like that.** Just simply that she gave testimony not in accordance with what he wanted her to and – or he wanted her to change her story and she refused to do so. And after they returned home from court that day, then this incident happened. **That's as far as I'm going to let you go with that.**

R. 11, l. 19 – 14, l. 5 (emphasis added).

Before Stanley took the stand, Judge Verdin warned the solicitor again about staying away from Day's conviction. R. 15, ll. 23 – 24. The solicitor stated, "I've gone over and over again, so... Keep your fingers crossed, Your Honor." R. 15, l. 25 – 16, l. 4. Despite the trial court's clear and unambiguous ruling and his representation to the court, the solicitor intentionally elicited testimony from Stanley about Day's conviction. R. 24, ll. 4 – 22. The solicitor asked the following:

Q. I assume you woke up that morning as normal?

A. Yes, sir.

Q. Where then did you go?

A. We went to the courthouse in Greer.

Q. Okay. Why did you go to the courthouse?

A. We had to take care of something that – it was for him and we went up there. And we took care of that and got done.

Q. Okay. Had he been charged with a prior crime?

A. He got charged that day, yes, sir.

Q. Okay. And that's what you were going to court for?

A. Yes, sir.

Q. Okay. When you got the court, did you speak with the Judge?

A. Yes, sir, I did.

Q. Okay. And did a Judge make a decision?

A. Yes, sir.

Q. And what was that decision?

A. He found John Day guilty.

R. 24, ll. 4 – 22 (emphasis added). Day immediately objected and the trial judge sent the jury out of the courtroom. R. 24, l. 24 – 25, l. 7. Once the jury was out of the courtroom, Day asked for a mistrial. R. 25, ll. 9 – 21. Defense counsel argued that a curative instruction would not work because the jury would “think that we’re hiding something from them.” R. 25, ll. 15 – 19. The court denied Day’s motion for a mistrial and gave the jury a curative instruction and ordered that portion of the testimony stricken. R. 26, l. 10 – 27, l. 13.

Discussion

The trial judge erred in not declaring a mistrial. Before the trial started, the court determined that evidence of Day’s conviction was unfairly prejudicial. Once the jury heard that Day had been convicted of another crime that involved Stanley, no curative instruction could repair that prejudice and declaring a mistrial was the only way to ensure Day received a fair trial untainted by this evidence.

The trial judge’s initial ruling that evidence of Day’s prior conviction was unfairly prejudicial was correct. See State v. Colf, 337 S.C. 622, 627, 525 S.E.2d 246, 248 (2000). Colf enunciates five factors a court must consider when “determining whether the probative

value of a prior conviction outweighs its prejudicial effect.” Id. The court should consider: (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness’s subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant’s testimony; and (5) the centrality of the credibility issue. Id.

A consideration of these factors demonstrates the unfair prejudice to Day from the admission of this evidence. While the jury did not know the exact nature of the court case, they did know that it was a criminal case because the solicitor asked if Day had been charged with a prior crime. R. 24, ll. 12 – 15. The jury knew that the crime involved Stanley. R. 24, ll. 7 – 18. The jury knew that Stanley spoke to the judge. R. 24, ll. 16 – 18. And the jury knew that Day had been found guilty. R. 24, ll. 19 – 23. The jury could infer that the prior crime was similar to the charge at trial because it involved Stanley. The jury knew the temporal proximity of the conviction. Day’s testimony and credibility were central to the case. Day took the stand in his defense and the jury was forced to believe either Day or Stanley.

Since Judge Verdin was correct in her assessment of the prejudicial effect of this evidence, this case will undoubtedly turn on a harmless error analysis. See State v. Heller, 399 S.C. 157, 171, 731 S.E.2d 312, 320 (Ct. App. 2012). An “[e]rror is harmless when it could not reasonably have affected the result of the trial.” Id., quoting State v. Byers, 392 S.C. 438, 447-48, 710 S.E.2d 55, 60 (2011). The harmless error doctrine “should be employed guardedly . . . and on a case by case basis.” State v. Morris, 289 S.C. 294, 297, 345 S.E.2d 477, 479 (1986). The facts of this case show that the error was not harmless and could not have been cured by the trial judge’s instruction. Stanley’s versions of the incident

were wildly inconsistent. She first claimed that the injuries were the result of falling down the stairs. She persisted in this claim even after Day was incarcerated and could not harm her. Her motive to fabricate the story is seen both in her words and her actions. In her letters and in her testimony, she admitted she was angry at Day for cheating on her. She also admitted on cross-examination that she withdrew Day's money from his account after he went to jail. Absent evidence of the conviction, the jury had every reason to disbelieve Stanley's claims.

State v. Howard, 396 S.C. 173, 180-81, 720 S.E.2d 511, 515-16 (Ct. App. 2012) is similar to Day's case. The defendant was charged with ABHAN against his girlfriend and the trial court admitted evidence of prior ABHAN convictions. Id. The trial court did not permit the jury to know that one of the prior ABHAN convictions involved the same victim. Id. This Court reversed, finding that the similarity of the prior convictions precluded a finding of harmless error. Id.; see also State v. Broadnax, 401 S.C. 238, 247-48, 736 S.E. 2d 688, 693 (Ct. App. 2013) (refusing to find harmless error where similar prior convictions were erroneously admitted). Since the jury knew that Day's prior crime involved Stanley, the admission of his prior conviction is more prejudicial than those in Thomas.

A review of the cases finding harmless error after admission of a prior conviction show that the error here requires reversal. In Heller, this Court determined that an error was harmless because overwhelming evidence of guilt existed. Heller at 172, 731 S.E.2d at 320. The Heller court also found that the admission of the defendant's prior drug conviction was cumulative to other evidence presented at trial. Id. Other testimony in the case revealed the defendant's illegal drug activity. Id. In Day's case, there is no overwhelming evidence of guilt and no other evidence of prior bad acts was admitted.

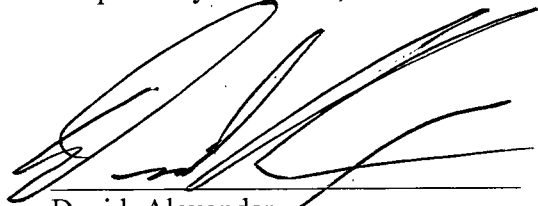
In State v. Young, 378 S.C. 101, 107, 661 S.E.2d 387, 390 (2008), the Supreme Court found harmless error after admission of a prior conviction because the jury acquitted the defendant of one of the charges. Here, the jury found Day guilty of essentially the same crime as his prior conviction. In State v. Pagan, 369 S.C. 201, 212-13, 631 S.E.2d 262, 267-68 (2006), the erroneous admission of a prior conviction for failure to stop for a blue light did not prejudice the defendant where other, more serious convictions were properly admitted. The State did not impeach Day with any prior convictions, so this reason for finding harmless error does not exist in this case.

Furthermore, the State's willingness to intentionally violate Judge Verdin's pretrial ruling shows the damaging effect of this evidence. There can be no other reading of the solicitor's questioning other than an intentional effort to disobey Judge Verdin's ruling. The witness was attempting to abide by the pretrial ruling, but the solicitor asked her a direct question to which the only answer would mention the conviction. This Court should heavily weigh the solicitor's disregard for the trial judge's ruling and desire to put this information before the jury when considering prejudice.

CONCLUSION

For the above-stated reasons, Day's conviction should be reversed and this Court should grant him a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David Alexander', written over a horizontal line.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 8th day of July, 2013.

STATE OF SOUTH CAROLINA

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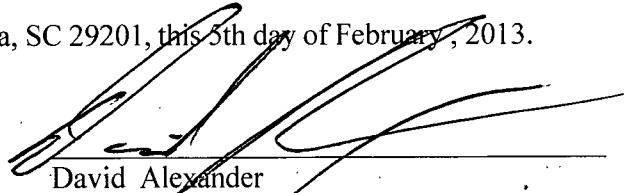
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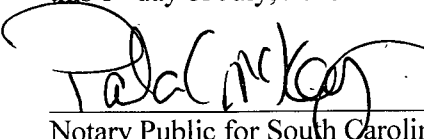
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Christina J. Catoe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 5th day of February, 2013.


David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

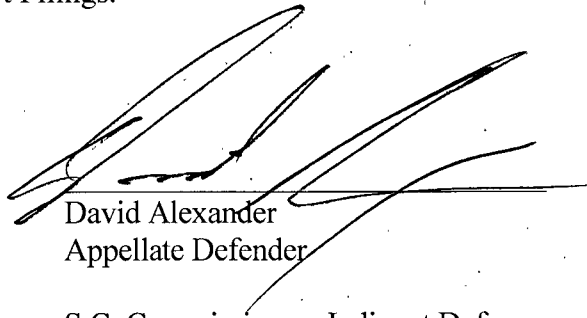
SUBSCRIBED AND SWORN TO before me
this 8th day of July, 2013.


(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 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 August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

July 8th, 2013

A handwritten signature in black ink, appearing to read "David Alexander", is written over a horizontal line.

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