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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lancaster County
R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KAYLA MARIE COOK,

APPELLANT

APPELLATE CASE NO. 2019-001417

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

I. The trial judge erred by failing to grant a mistrial when the lead detective informed the jurors that Appellant's older child, who did not testify, provided evidence that "reinforced" that Appellant caused the death of Minor.

Although Respondent conceded a law enforcement agent improperly testified to inadmissible hearsay from Appellant's older child, Respondent argued on appeal that a mistrial was not warranted in this case because (1) the admittedly improper testimony was vague and isolated; (2) the concededly inadmissible testimony did not reveal the "specific substance" of the hearsay; and (3) the undeniably properly excluded testimony was cured by the judge striking the testimony from the record and giving an alleged curative instruction. To the contrary, the government agent's testimony regarding what Appellant's older child allegedly said during a forensic interview infested the trial with a level of unfairness that could not be cured.

SLED Agent Trista Baird was determined the jury learn what Appellant's older child, Phoebe, told a forensic interviewer when questioned about Minor's death. The direct examination of Agent Baird showed exactly how determined she was for the jury to hear what Phoebe allegedly said:

> Q. And you can't say what she said, but was Phoebe [Appellant's older child] able to give the interviewer some information about this case?
>
> A. She was. The forensic in - -
>
> Mr. Burton: Objection, your Honor. None of what Phoebe said is admissible in this court under criminal.
>
> Solicitor Campbell: We agree.
>
> The Court: I understand that, and to the extent she's going to say what she said I'd sustain it. But if she's just asking preliminary it's okay. So overruled.
>
> Solicitor Campbell: We are. We're going directly from the case, your Honor.

> Q. Was she able - - you can't say what she said at all, okay? But was she able to give you information?
>
> A. Yes. The forensic interview, along with all the other evidence in the case, reinforced the fact that [Appellant] did cause [Minor]'s death.
>
> Mr. Burton: Objection, your Honor. This is ridiculous.

R. 601, l. 17 – R. 602, l. 9. Knowing that Phoebe's testimony had been excluded from evidence and knowing she was not allowed to say what Phoebe said "at all," Agent Baird still told the jurors that Phoebe's forensic interview "*reinforced* the fact that [Appellant] did cause [Minor]'s death." (emphasis added). The trial judge aptly noted that Agent Baird's testimony was "backdooring" testimony that had been excluded and avoided "all day long." See e.g., United States v. Hinson, 585 F.3d 1328 (10th Cir. 2009) (holding a detective's testimony that in an interview of an individual, the individual indicated the source of the individual's drugs was the defendant was hearsay and had no purpose except to prove the truth of the matter asserted – that the defendant was a drug supplier); United States v. Benitez-Avila, 570 F.3d 364, 369 (1st Cir. 2009) (explaining "[a] prosecutor cannot justify the receipt of prejudicial, inadmissible evidence simply by calling it 'background' or 'context' evidence"); United States v. Shiver, 414 F.2d 461, 463 (5th Cir. 1969) (holding an officer's testimony regarding what an investigation revealed was "pure hearsay" because the officer had personal knowledge of this "fact"); United States v. Reyes, 18 F.3d 65, 69-71 (2nd Cir. 1994) (holding testimony from an officer about what others said was inadmissible hearsay, not "context" or "background"). Although the trial judge struck the testimony from the record and instructed the jurors not to consider it, these attempts to cure could do little to remedy the audacious testimony by Agent Baird.

While Respondent made a gallant effort in his brief to save the trial judge's ruling, Respondent's argument dissolves when examined against the backdrop of the entire trial. As

mentioned in the brief of appellant, Appellant's trial was a classic "whodunnit?" The jury was tasked with determining who perpetrated the injury that resulted in Minor's death. The evidence presented allowed for two possible perpetrators – Appellant or Minor's father, Scotty. Granted, Agent Baird's testimony regarding what Phoebe said during her forensic interview was a single comment; however, it was "not exceedingly vague," "fleeting," or "indirect." See BOR at 21. According to Agent Baird, Phoebe provided information that "reinforced the fact that [Appellant] did cause [Minor]'s death." This comment is far from exceedingly vague, fleeting, or indirect. The state's case against Appellant relied upon circumstantial evidence – Minor suffered a fatal injury during a specific time period and Appellant was the only adult with Minor during that time period. The state wanted the jury to use this circumstantial evidence to convict Appellant despite evidence that the time period for the infliction of the injury was much larger than that testified to by the state's witnesses. To ensure the jury did so, the state used a SLED agent to present concededly inadmissible hearsay from Appellant's own daughter.

Notwithstanding the fact that the SLED agent did not repeat exactly what Phoebe said verbatim and the improper testimony was not repeated, testimony from a SLED agent that Appellant's own daughter *reinforced* the SLED agent's determination that Appellant was the culprit necessarily prejudiced Appellant in a way that no curative instruction could extinguish. Throughout the entirety of the trial, the state sought to portray Minor's father, Scotty, as a loving, doting father and Appellant as a jealous, abusive live-in lover. Agent Baird's testimony regarding what Appellant's daughter revealed during her forensic interview was just the evidence the state needed to tip the scales for the jury. Here, Agent Baird's testimony was more than simply background or part of the investigation. The testimony relayed to the jury that even Appellant's daughter believed she had killed Minor. This type of testimony was inevitably

powerful and unforgettable, no matter the instructions provided by the judge. See State v. White, 371 S.C. 439, 446, 639 S.E.2d 160, 164 (Ct. App. 2006) (citing State v. Simpson, 325 S.C. 37, 479 S.E.2d 57 (1996)) (holding that "[w]hile an instruction to disregard incompetent evidence usually is deemed to have cured the error in its admission, a mistrial may still be required if on the facts of the particular case it is probable, notwithstanding such instruction or withdrawal, the accused was prejudiced").

II. The trial judge erred by allowing the state to introduce evidence that Minor suffered an injury to her arm two-to-four weeks prior to her death where (1) the evidence was irrelevant, (2) the evidence was inadmissible character evidence, and (3) the probative value of the evidence was substantially outweighed by its prejudicial effect.

"Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." Rule 404(a), SCRE. This Rule prohibits the prosecution from introducing evidence of a defendant's other bad acts for the purpose of proving his propensity to commit the crime for which the defendant is currently on trial. State v. Perry, 430 S.C. 24, 30, 842 S.E.2d 654, 657 (2020). Evidence the defendant committed *similar* criminal acts has the *inherent* tendency to show this propensity. Id. Although, "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.

During the trial, the solicitor never indicated under which exception she sought to admit evidence of Minor's broken arm. However, on appeal, Respondent argues the evidence was admissible under the intent exception. Intent is closely related to motive; therefore, Appellant will discuss them together. See State v. Fonseca, 383 S.C. 640, 648, 681 S.E.2d 1, 4 (Ct. App. 2009). On this point, the South Carolina Supreme Court has explained that

> [I]n a prosecution for homicide, evidence of other crimes committed by the defendant which are in time and circumstances so intimately connected with and a part of the crime with which he is being charged as to show a motive for the commission of the homicide or a state of mind indicating a purpose for its commission, is admissible to establish such motive or state of mind.

State v. Grainger, 275 S.C. 417, 421, 272 S.E.2d 175, 176 (1980). In State v. Sweat, 362 S.C. 117, 124-125, 606 S.E.2d 508, 512 (Ct. App. 2004), this Court held that a prior criminal domestic violence incident between the defendant and victim in an assault and battery trial was admissible to show intent and motive where the victim had pressed charges against the defendant for the prior incident, the defendant had gone to jail for the incident, and the assault and battery occurred only eleven days after his release from jail.

In State v. Plyler, 275 S.C. 291, 296, 270 S.E.2d 126, 128 (1980), our Supreme Court allowed evidence of a verbal altercation between the victim and the defendant three days prior to the killing. The Court explained that "[e]vidence of previous difficulties or ill feelings between the accused and the victim and of facts showing the cause of such difficulties or ill will is admissible on the question of motives *where there is some connection of cause and effect between the evidence and the crime*." Id. (emphasis added). Only where the prior bad act evidence shows motive on the part of the accused and is not so remote in time as to negate its probative value may the evidence be admitted. Id.

The South Carolina Supreme Court held the introduction of evidence of a vendetta to establish motive, bias, and prejudice on the part of the alleged victim and her family by a criminal defendant "was clearly relevant and should have been admitted." State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986). The defendant's "entire defense at trial was that he did not commit the alleged act and that the child's story was concocted by her parents because of a 'vendetta' against him." Id. at 303-304, 342 S.E.2d at 403. The Court held "the trial court's ruling on the motion to limit the testimony and its refusal to allow [the defendant]'s proffer of testimony effectively denied [the defendant] a fair and impartial trial because he was not allowed to present his defense." Id. at 304, 342 S.E.2d at 403.

Contrary to Respondent's assertion, evidence of Minor's injured arm was not admissible pursuant to the intent exception under Rule 404(b), SCRE. As the Supreme Court has made clear, "[t]o be admissible, the bad act must logically relate to the crime with which the defendant has been charged." State v. Gaines, 380 S.C. 23, 29, 667 S.E.2d 728, 731 (2008). Although determining whether evidence falls within one of the exceptions is difficult, "the dangerous tendency and misleading probative force of this class of evidence require that its admission should be subjected by the courts to rigid scrutiny." State v. Lyle, 125 S.C. 406, 406, 118 S.E. 803, 807 (1923). Due to the "inevitable tendency of such evidence is to raise a legally spurious presumption of guilt in the minds of the jurors," "if the court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected." Id.

Evidence of Minor's injured arm in no way showed Appellant manifested extreme indifference to Minor's life on the day that Minor died. Simply put, Minor's injured arm was *unrelated* to the fatal injuries in both time and logic. The evidence of Minor's injured arm and the alleged failing to supply professional medical treatment did not assist the jury in understanding a material issue in the case related to one of the five exceptions. See State v. Smith, 391 S.C. 353, 361, 705 S.E.2d 491, 495 (Ct. App. 2011). At trial, the state presented no evidence or even argument that Minor's injured arm was logically connected to her fatal abdominal injury. According to the state, Minor's arm injury showed that Appellant failed to render aid to Minor when her arm was injured, and therefore, she was likely the person who failed to render aid to Minor when she suffered fatal injuries to her abdomen. Thus, the state sought to introduce the alleged prior bad act for propensity.

Finally, evidence of the prior bad act must be clear and convincing. State v. Fletcher, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008). "Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established. Such proof is intermediate, more than a mere preponderance but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal." Id. Here, the solicitor failed to show by clear and convincing evidence that Appellant failed to provide professional medical treatment to Minor because the evidence never even established such treatment was necessary. Although Minor's arm was swollen and bruised, Minor acted *normally* according to every witness who testified to the subject. Therefore, there was no requirement for Appellant to seek professional medical care for Minor due to the seemingly insignificant injury.

Respondent faults Appellant for not addressing State v. Holder, 382 S.C. 278, 676 S.E.2d 690 (2009) and State v. Martucci, 380 S.C. 232, 669 S.E.2d 598 (Ct. App. 2008) in her brief. BOR at 29 n.22. Appellant did not include these two cases in her brief because the two cases are not on point for resolving the issue presented. Respondent suggests that Appellant's decision not to address these two cases is "telling" in some nefarious way. Rather, Appellant's decision not to address these two cases is "telling" of one matter only – the two cases do not assist in resolving the issue in dispute in this case.

The Supreme Court held that Holder's co-worker's testimony regarding Holder's change in appearance and conversation was not inadmissible character evidence. State v. Holder, 382 S.C. 278, 287-289, 676 S.E.2d 690, 695-696 (2009). The Court held "the coworker was merely recounting her version of events leading up to the time Holder's child was killed, as well as her impression of Holder during this time frame." Id. at 289, 676 S.E.2d at 696. According to the Court,

> The state's purpose for offering the testimony was not to show Holder had a propensity to abuse her child in conformance with a character trait. Rather, it was to show Holder's strong desire to please Martucci instead of protecting the welfare of her child and to establish an element of the offense, that she manifested an extreme indifference to the well-being of her son.

Id. In light of the Court's determination that the evidence in dispute was not character evidence, Holder has no impact on the issue presented here.

Although Martucci concerned evidence of prior bad acts, this Court's holding in Martucci has no bearing on the resolution of Appellant's appeal because the state showed by clear and convincing evidence that Martucci engaged in the prior bad acts, but the state failed to show that Appellant broke Minor's arm for failed to render necessary medical aid by clear and convincing evidence. According to this Court, the element of extreme indifference could be shown by evidence of "Martucci's hostility, cruelty, and abuse toward Child," which included evidence that during the weeks before the death "Martucci abused Child by slapping his face, taping his mouth shut, and dunking his head in the bathtub until he choked to stop him from crying." State v. Martucci, 380 S.C. 232, 252-253, 669 S.E.2d 598, 609 (Ct. App. 2008). This Court explained that "[t]he presence of bite marks and bruises, and the fact that Martucci kept Child's skin covered and rarely let him out of the house in the apparent attempt to conceal the abuse, [was] further evidence of Martucci's state of mind to inflict the fatal injuries." Id. at 253, 669 S.E.2d at 609. "Because Martucci disputed the motive and intent to commit homicide by child abuse, evidence of the prior abuse or neglect was highly probative of his guilt on the homicide charge." Id. Unlike the clear and convincing evidence that Martucci committed the prior bad acts of abuse and neglect, the state did not, and could not, show Appellant broke Minor's arm or failed to render necessary medical assistance to Minor. Thus, Martucci's holding has no bearing on the issue presently before this Court.

Next, Respondent criticized Appellant by claiming Appellant raised an issue on appeal that had not been objected to by trial counsel, namely, the prosecutor's inflammatory closing argument. BOR at 38 n.26. Respondent's claim is an attempt at misdirection. Appellant made clear that references to the solicitor's argument were not an independent issue on appeal. Instead, such references were used to show the danger of unfair prejudice and the prejudicial nature of the error to demonstrate that the error requires reversal. Specifically, in her closing argument, the solicitor accused Appellant of lying to the police regarding Minor's broken arm. R. 839, ll. 9-21. She asked the jurors to recall the testimony indicating that Minor was "telling people Mommy did that." R. 839, ll. 12-15. Finally, the solicitor argued that the "time line of events" relevant for the jury's consideration started with Minor's fall from the bed when she broke her arm. R. 851, ll. 15-17. This fall occurred "[s]ometime before Thanksgiving." R. 851, ll. 15-17. She reminded the jurors that the doctors "testified how painful that would be" despite numerous witnesses testifying that Minor complained little of any pain from her injured arm. R. 851, ll. 17-18. Thus, as shown, despite the solicitor's admission that she could not show Appellant caused the arm injury, in closing argument, the state reminded the jurors of the testimony from a neighbor that Minor was telling people that Appellant caused her injury. Thus, the state hoped the jury would believe Appellant caused the injury despite the lack of evidence. Contrary to Respondent's attempt to malign Appellant on appeal with a claim that Appellant has raised an issue not preserved, Appellant has presented an argument on appeal for why the trial error requires reversal, which revolves around *how* the solicitor used the improperly admitted evidence at trial. This is a classic way of showing reversible error on appeal and not some sort of nefarious slight-of-hand as suggested by Respondent.

Similarly, Respondent rebukes Appellant for "heavily criticiz[ing]" the trial judge regarding his limiting instructions to the jury. BOR at 38-39 n.27. Again, Respondent argues that because trial counsel did not object to the "how and when" of the limiting instruction, Appellant's argument on appeal is unpreserved. This Court must reject yet another attempt at misdirection by Respondent. In the brief, Appellant argued why the limiting instruction was not sufficient to cure the error and why a mistrial was necessary despite the limiting instruction. Appellant's discussion of the limiting instruction, including the "how and when" of the instruction, detailed how the instruction was confusing, singled-out specific evidence, and improperly instructed the jury how to treat the singled-out evidence. In light of the confusing nature of the instruction, and what bordered on a charge on the facts, Appellant argued the limiting instruction could not cure the error committed by the trial judge in allowing the evidence to be admitted.

Setting aside Respondent's attempts at obfuscation, the trial judge erred in allowing the jury to hear evidence about Minor's broken arm and Appellant's failure to seek professional medical treatment for the arm because the solicitor – and Respondent on appeal – failed to show how the evidence satisfied one of the exceptions to Rule 404(b), SCRE, and the solicitor failed to present clear and convincing evidence of the same.

CONCLUSION

Appellant respectfully requests this Court reverse her conviction and remand for a new trial in light of the egregious errors committed by the trial judge.

s/*Susan B. Hackett*
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Appellate Defender

ATTORNEY FOR APPELLANT

This 15th day of July, 2021.

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CERTIFICATE OF COUNSEL

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

July 15, 2021

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