STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable William H. Seals, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

THOMAS HENRY BROWN, JR.

APPELLANT

APPELLATE CASE NO. 2023-000261

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge abuse his discretion by admitting evidence that Appellant allegedly solicitated Minor in Colleton County several hours after he allegedly solicited her in Charleston County, the offense for which he was tried, since such evidence was improper propensity evidence, was not admissible pursuant to Rule 404(b), SCRE, was not part of the *res gestae*, and any probative value of the evidence was substantially outweighed by the danger of unfair prejudice?

STATEMENT OF THE CASE

A Charleston County grand jury indicted Appellant on September 25, 2018 for criminal solicitation of a minor. R. * (Indictment). His case was called to trial on May 31, 2022 before the Honorable William H. Seals, Jr. Tr. 1. Assistant Solicitors Kelsey Davis and Deborah Herring-Lash represented the state. Tr. 1. Rodney Davis and Lyndsay Luthringer represented Appellant. Tr. 1. On June 1, 2022, the jury found Appellant guilty as indicted. Tr. 167, ll. 15-21. He was sentenced to eight years imprisonment. Tr. 177, ll. 2-4.

This appeal follows.

STATEMENT OF FACTS

To celebrate her fifth grade graduation, Minor, who was then eleven years old, spent the first weekend in June 2018 with her aunt, Monique Williams, Appellant, who was Monique's longtime boyfriend, and Monique's four young children, who were Minor's first cousins.[1] Tr. II. 17, ll. 18 – 20, l. 7; Tr. II. 114, ll. 15-16. At the time, Monique and Appellant lived together at a hotel. Minor and her cousins stayed with the couple at their hotel that weekend.[2] Tr. II. 78, ll. 4-9; Tr. II. 79, ll. 9-21.

On Saturday, June 2, 2018, the group met Minor's grandparents at the beach in Isle of Palms. Tr. II 20, l. 13 – 21, l. 6. The children swam in the water and played in the sand for a couple of hours. Tr. II. 21, ll. 7-8; Tr. II. 67, ll. 1-2. At the end of the excursion, the group walked to their cars, which were parallel parked on the side of the road next to the beach. Minor's grandparents' vehicle was parked directly behind Appellant's car. Tr. II. 24, l. 21 – 26, l. 20; Tr. II. 66, ll. 11-18; R. * (State's Exhibit No. 2).

When the group reached their cars, one of Minor's cousins saw a snake near the rear driver's side of Appellant's car. This caused a lot of commotion. Tr. II. 21, ll. 9-23; R. * (State's Exhibit No. 2). Appellant and Monique eventually chased the snake away. Tr. II. 37, l. 1 – 38, l. 9; Tr. II. 42, ll. 1-7. Minor then walked to the passenger side of Appellant's car. She claimed that as she was brushing sand off the bottom of her shoes, Appellant touched her arm "to get her attention" and asked, "Can you suck my dick?" Minor tried to pull away from Appellant causing her to slightly stumble. She then climbed into Appellant's vehicle. Tr. II. 21, l. 24 – 23, l. 15; Tr. II. 42, l. 8 – 43, l. 3. She did not tell anyone what Appellant allegedly said. Tr. II. 27,

[1] Monique Williams and Minor's mother, Sheila Simmons, are sisters. Tr. II. 18, ll. 5-8.

[2] Monique's four minor children lived with their father in downtown Charleston. Tr. II. 77, l. 1; Tr. II. 53, ll. 1-8.

ll. 14-23. Despite the presence of seven other people around the two vehicles, no one else heard Appellant's alleged statement.

After loading up, Minor's grandparents left in their car and Appellant, Monique, Minor, and her cousins returned to their hotel room. Tr. II. 28, ll. 18-21. The group washed up and then drove to a bonfire at a beach in Cottageville, which is in Colleton County. Tr. II. 28, l. 22 – 29, l. 15; Tr. II. 82, l. 17 – 83, l. 1. Shortly after arriving at the bonfire, Minor and one of her cousins returned to the car to grab their water and candy. Minor's cousin reached the car first, grabbed her candy, and went back to the bonfire. Minor then opened the rear door on the passenger's side of the vehicle. She claimed as she was reaching inside to grab her water and candy, Appellant, who was sitting in the driver's seat, touched her hand and again asked, "Can you suck my dick?" Tr. II. 29, l. 16 – 31, l. 7.

Minor was "confused" and "scared." Tr. II. 31, ll. 15-17. Once they got back to their hotel room after the bonfire, Minor used her phone to message her mother.[3] She told her mom "that [she] had to tell her something" and asked her mom "to see if [Minor] could come home the next morning" instead of the following evening. Tr. II. 31, l. 17 – 32, l. 12. The next morning, which was Sunday, Appellant drove Minor and her four cousins home because Monique was at work. Appellant dropped Minor's cousins off first at their father's house and then took Minor home. Nothing happened when Minor was alone in the car with Appellant. Tr. II. 33, ll. 6-19.

As soon as she walked inside her house, Minor told her mom what Appellant allegedly said. Tr. II. 33, ll. 23-24. Her mother reported the allegations to the police that day. Tr. II. 105, ll. 8-15. Shortly thereafter, on June 18, 2018, Minor attended a forensic interview at Dee Norton

[3] Minor had a cell phone. However, it only worked when connected to Wi-Fi. Tr. II. 101, ll. 19-23.

Child Advocacy Center. Tr. II. 105, ll. 19-22; Tr. II. 123, ll. 10-20. The recording of Minor's forensic interview was played for the jury. See State's Exhibit No. 3 (Forensic Interview Disk).

STANDARD OF REVIEW

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Atieh, 397 S.C. 641, 647, 725 S.E.2d 730, 733 (Ct. App. 2012) (quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)) (internal quotation marks omitted). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id. (quoting Pagan, 369 S.C. at 208, 631 S.E.2d at 265) (internal quotation marks omitted).

ARGUMENT

The trial judge abused his discretion by admitting evidence that Appellant allegedly solicitated Minor in Colleton County several hours after he allegedly solicited her in Charleston County, the offense for which he was tried, since such evidence was improper propensity evidence, was not admissible pursuant to Rule 404(b), SCRE, was not part of the *res gestae*, and any probative value of the evidence was substantially outweighed by the danger of unfair prejudice.

Relevant Facts

Appellant moved pretrial to exclude evidence that Appellant allegedly solicitated Minor in Colleton County several hours after he allegedly solicited her in Charleston County, the offense for which he was tried pursuant to Rule 404(b), SCRE. R. * (Motion to Exclude Testimony of Other Acts). The trial judge held an *in camera* hearing in response to Appellant's motion. The state proffered Minor's testimony, which was consistent with her testimony before the jury, as summarized above. See Tr. 52, l. 3 – 50, l. 2.

Appellant proffered the testimony of Rebecca Hernandez and Jeremy Wheeler, who were present at the bonfire in Colleton County when the second alleged solicitation took place. Hernandez testified that she was at the bonfire on June 2, 2018 with her husband, Jeremy Wheeler, her mother, Beverly Herring, and her two young daughters. Hernandez and her husband were friends with Monique and Appellant and "hung out with them regularly." Tr. 71, l. 12 – 73, l. 21. Hernandez explained that when Appellant and Monique arrived at the bonfire, Monique walked over to where Hernandez was sitting with her mother at the back of Hernandez's vehicle. Monique's children and her niece, Minor, "ran off with" Hernandez's daughters. Tr. 73, l. 22 – 74, l. 23. Appellant, however, remained inside his car and

Hernandez's husband walked over to him. Tr. 74, ll. 10-13. Hernandez testified that Wheeler stayed with Appellant the entire night. At some point, Hernandez walked over to Appellant's vehicle where Appellant and Wheeler were socializing. However, she maintained that she never heard Appellant say "anything inappropriate to Monique's niece." Tr. 77, ll. 6-25.

Jeremy Wheeler testified consistent with Hernandez. He explained that when Monique and Appellant arrived, Monique went and sat with Hernandez while Wheeler walked over to Appellant. Wheeler maintained that he stayed with Appellant the entire night. Tr. 89, ll. 3-22. The two walked around the bonfire and smoked a "blunt" at the car away from the children. Tr. 90, l. 1 – 91, l. 2. Wheeler never heard Appellant "say anything inappropriate to Monique's niece." Tr. 91, ll. 3-5.

Defense counsel argued the state failed to produce clear and convincing evidence that the prior bad act (the second alleged solicitation in Colleton County) occurred. Additionally, he argued that none of the exceptions outlined in Rule 404(b) apply, specifically, motive, intent, the absence of mistake or accident, a common scheme or plan, or identity. He emphasized that the state sought to admit the prior bad act merely as propensity evidence and to attack Appellant's character. Lastly, defense counsel argued that evidence of the second alleged solicitation must be excluded pursuant to Rule 403, SCRE, because it is unfairly prejudicial. He contended the evidence was "dynamite" and Rule 403 "must fall in as a safety net and catch this" highly prejudicial evidence. Tr. 101, l. 20 – 108, l. 15.

The trial judge ruled the evidence was admissible. He reasoned, "[F]irst of all, I find that the evidence is relevant. Secondly, I find that it happened on the same day, simply hours apart, at the defendant's car, with the same defendant, the same victim. The solicitation was the exact same wording, and the bad act logically relates to the crime for which the defendant has been

charged. Therefore, I'm going to allow that 404(b), to show quite possibly all of this, the motive, common scheme or plan, absence of [mistake] or [accident] or intent. As far as 403 goes, I find the probative value outweighs its prejudicial effect. It's not another crime, not another victim, not something more serious, less serious, it happened the same day. So I think it is very probative, and outweighs its prejudicial effect, so I'm going to allow it." Tr. 108, l. 16 – 109, l. 10.

Upon agreement of the parties, the judge later charged the jury with the following limiting instruction:

> You have heard evidence that the defendant has committed a bad act other than the one for which the defendant is now on trial. This testimony, if you conclude it is true, may only be considered by you on the question of motive, intent, absence of mistake, and common scheme or plan and for no other reason.
>
> You may give this evidence the weight and value, if any, which you find it should have on the sole issue of motive, intent, absence of mistake, and common scheme or plan. You must not consider evidence of the commission of another bad act as proof of the defendant's guilt of the charge we are trying him on today.

Tr. 160, ll. 9-20.

Discussion

The trial judge abused his discretion by admitting evidence that Appellant allegedly solicitated Minor in Colleton County several hours after he allegedly solicited her in Charleston County, the offense for which Appellant was tried, since such evidence was improper propensity evidence, was not admissible pursuant to Rule 404(b), SCRE, was not part of the *res gestae*, and any probative value of the evidence was substantially outweighed by the danger of unfair prejudice.

"Rule 404(b) prevents the State from introducing evidence of a defendant's other crimes for the purpose of proving his propensity to commit the crime for which he is currently on trial."

State v. Perry, 430 S.C. 24, 30, 842 S.E.2d 654, 657 (2020). "South Carolina law precludes evidence of a defendant's prior crimes or other bad acts to prove the defendant's guilt for the crime charged except to establish (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan, or (5) the identity of the perpetrator." State v. King, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999) (citing Rule 404(b), SCRE, and State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923)). "As a threshold matter, the trial court must determine whether the proffered evidence is relevant as required under Rule 401, SCRE." State v. Cope, 405 S.C. 317, 337, 748 S.E.2d 194, 204 (2013) (citing State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009)). "If the trial court finds the evidence is relevant, it must then determine whether the bad act evidence fits within an exception in Rule 404(b)." Id.

"To be admissible, the bad act must logically relate to the crime with which the defendant has been charged." Clasby, 385 S.C. at 155, 682 S.E.2d at 895 (quoting State v. Gaines, 380 S.C. 23, 29, 667 S.E.2d 728, 731 (2008) (internal quotation marks omitted). "If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing." Cope, 405 S.C. at 337, 748 S.E.2d at 204 (quoting Gaines, 380 S.C. at 29, 667 S.E.2d at 731) (internal quotation marks omitted). "Even if prior bad 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 to the defendant." Cope, 405 S.C. at 337-38, 748 S.E.2d at 204-05 (citing Clasby, 385 S.C. at 155, 682 S.E.2d at 896); See Rule 403, SCRE. "Unfair prejudice means 'an undue tendency to suggest [a] decision on an improper basis, commonly, though not necessarily, an emotional one.'" State v. Sweat, 362 S.C. 117, 128, 606 S.E.2d 508, 514 (Ct. App. 2004) (quoting State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991)) (alteration in original).

The *res gestae* theory "recognizes evidence of other bad acts may be an integral part of the crime with which the defendant is charged, or may be needed to aid the fact finder in understanding the context in which the crime occurred." King, 334 S.C. at 512, 514 S.E.2d at 582 (citing State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996), *overruled on other grounds by* State v. Giles, 407 S.C. 14, 754 S.E.2d 261 (2014)). Our Supreme Court explained the theory of *res gestae* in Adams:

> One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence "furnishes part of the context of the crime" or is necessary to a "full presentation" of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its "environment" that its proof is appropriate in order "to complete the story of the crime on trial by proving its immediate context or the 'res gestae'" or the "uncharged offense is 'so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other ...' [and is thus] part of the res gestae of the crime charged." And where evidence is admissible to provide this "full presentation" of the offense, "[t]here is no reason to fragmentize the event under inquiry" by suppressing parts of the "res gestae."

Adams, 322 S.C. at 122, 470 S.E.2d at 370-71 (quoting United States v. Masters, 622 F.2d 83, 86 (4th Cir. 1980)) (alterations in original). "Under this theory, it is important that the temporal proximity of the prior bad act be closely related to the charged crime." King, 334 S.C. at 513, 514 S.E.2d at 583 (citing State v. Hough, 325 S.C. 88, 480 S.E.2d 77 (1997)).

In State v. Sweat, 362 S.C. 117, 606 S.E.2d 508 (Ct. App. 2004), this Court affirmed the admission of evidence of a prior bad act of domestic violence pursuant to Rule 404(b), and as part of the *res gestae*. Sweat was charged with first degree burglary, assault and battery with intent to kill, and three counts of assault of a high and aggravated nature after he invaded a home occupied by his estranged wife, her boyfriend, and several others on December 11, 2001. Sweat, 362 S.C. at 121-22, 606 S.E.2d at 510-11. The state introduced testimony from Sweat's estranged wife about a domestic violence incident that took place two months earlier in October

2001. Id. at 122, 606 S.E.2d at 511. Sweat's wife reported the prior incident to law enforcement and Sweat spent forty-five days in jail. Id. While he was in jail, Sweat's wife ended their relationship and became romantically involved with another man. Id.

This Court held the prior episode of domestic violence was admissible under Rule 404(b) as evidence of motive and intent. Id. at 124, 606 S.E.2d at 512. The Court found from the October incident that the jury could have inferred both (1) motive—that Sweat was driven by anger over his estranged wife causing him to go to jail and terminating their relationship; and (2) intent—that Sweat maliciously sought to inflict harm upon his estranged wife and her boyfriend. Id. at 126, 606 S.E.2d at 513. This Court held the evidence was relevant because it tended to make the state's version of the case more probable and was logically related to why Sweat went to the house that night and to his intentions once there. Id. at 127, 606 S.E.2d at 514.

Additionally, this Court held the evidence was admissible as part of the *res gestae* and was properly admitted to "complete the story of the crime on trial." Id. at 133, 606 S.E.2d at 517. The Court concluded that the October incident, and the events that followed, including Sweat's estranged wife moving out and ending their relationship, provided the jury with "an appropriate context in which to place the December 11 attack." Id.

In this case, the second solicitation that allegedly occurred in Colleton County should have been excluded pursuant to Rule 404(b), SCRE, because the state failed to present clear and convincing evidence that the act occurred. The only evidence the solicitation actually occurred was Minor's testimony. The state presented no evidence whatsoever to corroborate Minor's allegations. Wheeler, who was with Appellant all night while Appellant was at the bonfire, testified that he never heard Appellant say anything "inappropriate" to Minor. Hernandez, who was also at the bonfire, also never heard Appellant say anything "inappropriate" to Minor.

Additionally, none of the exceptions contained in Rule 404(b) apply. Rather, the evidence was merely used by the state as propensity evidence and to show Appellant is bad person. As defense counsel argued at trial, such evidence was "dynamite" and unfairly prejudicial to Appellant. There is a reasonable probability the jury convicted Appellant on an improper basis, namely that because he supposedly solicited Minor in Colleton County, he must have also done so in Charleston County. Consequently, the evidence also should have been excluded pursuant to Rule 403.

Respectfully, this Court should hold the trial judge abused his discretion by admitting evidence of the second alleged solicitation, reverse Appellant's conviction, and remand for a new trial.

CONCLUSION

Based on the foregoing argument, this Court should reverse Appellant's conviction and sentence and remand for a new trial.

Respectfully submitted,

s/ Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 6th day of October, 2023.