THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

Clifton Newman, Circuit Court Judge

Appellate Case No. 2023-000669

The State of South Carolina, Respondent,

v.

Ernest Condre Bethel, Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. WHETHER THE TRIAL COURT ERRED BY ADMITTING EVIDENCE OF APPELLANT'S ALLEGED INVOLVEMENT IN A PRIOR SHOOTING AT THE SAME LOCATION WHEN THE STATE FAILED TO PROVE THE PRIOR BAD ACT BY CLEAR AND CONVINCING EVIDENCE, THE PROPENSITY EVIDENCE WAS NOT LOGICALLY RELEVANT TO A MATERIAL FACT AT ISSUE, AND THE STRIKING SIMILARITY OF THE EVIDENCE ENHANCED THE SUBSTANTIAL UNFAIR PREJUDICE TO APPELLANT.

STATEMENT OF THE CASE

On December 18, 2019, the Richland County Grand Jury indicted Appellant, Ernest Bethel, for two counts of Murder, two counts of Attempted Murder, and one count of Possession of a Weapon During the Commission of a Violent Crime (Indictment Nos. 2019GS4008050–8054). (R. *)

On April 17, 2023, Appellant proceeded to trial before the Honorable Clifton Newman and a jury. (Tr. p. 1–421). Justin Kata, Esq., represented Appellant, and Deputy Solicitor Daniel Goldberg and Assistant Solicitor Nicholas Fowler prosecuted the case on behalf of the State. The jury returned a guilty verdict for all five indictments on April 20, 2023. (Tr. p. 401, line 11 – 402, line 9). The Trial Court sentenced Appellant to fifty (50) years imprisonment for each Murder conviction, thirty (30) years imprisonment for each Attempted Murder conviction, and five (5) years imprisonment for the Possession of a Weapon During the Commission of a Violent Crime conviction. (Tr. p. 419, line 25 – 420, line 11). The Trial Court imposed concurrent sentences for all convictions.

On April 25, 2023, Appellant timely filed a Notice of Appeal. (R.*). This appeal follows.

STATEMENT OF THE FACTS

On August 22, 2019, Appellant and two acquaintances arrived at McCary's Bar and Grill. Upon entering the bar, Appellant encountered Tolliver Wise who was standing at the door preparing to exit the building. Appellant and Wise shook hands and "ended in a hug, indicating peace." (Tr. p. 76, lines 14-19; p. 91, line 25; p. 92, lines 1-4; p. 271, line 25; p. 272; lines 1-6).

Several individuals in the bar, which included John Miller and Christopher Lott, then walked over to Appellant in a hostile manner and surrounded him. (Tr. p. 272, lines 11-25; p. 273, lines 1-22). One of the bartenders, Cameron Jenkins, and his co-worker, Gregory Martin, also approached the group and tried to calm the situation. (Tr. p. 273, lines 23-25; p. 274, line 1; p. 92, lines 5-22). Appellant testified that Jenkins intervened "*because they were intoxicated and they already had it out for me the moment I walked in there.*" (Tr. p. 273, lines 2-7) (emphasis added). Appellant testified that he perceived the four (4) individuals surrounding him in an aggressive and hostile manner. (Tr. p. 275, lines 6-10).

Suddenly, John Miller, threw a drink in Appellant's face and a physical altercation ensued. (Tr. p. 77, lines 20-25; p. 78; lines 1-3; p. 94, lines 16-20; p. 275, lines 16-20). Appellant testified that he was hit in the face and head multiple times and slammed into a table during this attack by the group of men. (Tr. p. 276, lines 6-9). Appellant ultimately backed out of the building and testified that he noticed Tolliver Wise pulling up his pants, signaling that he was going for his gun. (Tr. p. 276, lines 10-25; p. 277, lines 1-3; p. 277, lines 16-25; p. 278, lines 1-7).

In response to Wise's actions, Appellant pulled his gun and began firing at him. Wise also shot his gun from inside the bar, and Appellant returned fire. (Tr. p. 282, lines 1-24). Jenkins, Martin, Lott, and Wise were wounded during the shooting. Wise and Lott ultimately died as result of their injuries. (Tr. p. 224, lines 4-13; p. 173, lines 17-25; p. 174, lines 1-21).

Pre-Trial

During a pre-trial hearing, Defense Counsel objected to the admissibility of Appellant's alleged involvement in a prior shooting at the same location. (Tr. p. 38, lines 2-14; p. 40, line 15 – 43, line 2). Specifically, after Defense Counsel reiterated that the alleged incident occurred "[a]t the same place, different time and some different people[,]" the Trial Court remarked, "Oh, goodness." (Tr. p. 38, lines 9-11). Defense Counsel restated, "So, Your Honor, we would object to that [testimony]." (Tr. p 38, lines 12).

In response, the State informed the Trial Court that Appellant was allegedly banned from the bar due to a prior shooting. (Tr. p. 39, lines 11-25, p. 40, line 15 – 43, line 2). Specifically, the Prosecutor conceded that he "couldn't get the exact date correct" of when the alleged prior shooting occurred and that there is no supporting documentary evidence of the alleged shooting (i.e., no police report). (Tr. p. 40, line 19; p. 42, lines 4-5).

The State believed the admissibility of the alleged prior incident is a "twofold issue...in terms of part one would be the testimony of whether he was not allowed to be there as a result of this prior incident... And then part two of that would be whether or not the State would be allowed to go into the specifics of that incident to include the shots being fired into the air." (Tr. 41, lines 19-25). The Trial Court then inquired whether Appellant was charged for the alleged prior shooting, and the State confirmed he was not arrested because "there was no law enforcement notification provided." (Tr. p. 42, lines 4-5).

In response, Defense Counsel argued, "I have an extreme objection to any mention of a prior shooting" and "less of an objection to...discussions about whether he was given notice not to be back." (Tr. p. 42, lines 12-16). Defense Counsel reiterated, "I think once we go into the facts of the specific shooting, it becomes unduly prejudicial." (Tr. p. 42, lines 16-18). Notably, Defense

Counsel informed the Trial Court that "identity is not an issue in this case." (Tr. p. 43, lines 3-4).

The Trial Court ultimately deferred ruling on this issue until the presentation of evidence during trial: "Everyone knows it's an issue, so we'll deal with it." (Tr. p. 43, lines 5-7).

Trial

During the State's direct examination of Gregory Martin who worked at the bar, the State inquired, "So[,] this night on August 22nd, what was your understanding about whether or not Mr. Bethel was allowed to be at McCary's?" Martin responded, "I knew he was banned, was not allowed to be there." The State then asked, "And what was that -- in general terms, what was that due to?" Defense Counsel contemporaneously objected as Martin attempted to discuss the alleged prior incident, and the Trial Court immediately overruled the objection. (Tr. p. 102, lines 3-11).

Martin proceeded to testify that he was at the bar the night of the alleged prior incident and witnessed an argument between Appellant and Kerry Ross. (Tr. p. 102, line 12 – 103, line 5). As Martin began to describe Appellant's actions once he exited the bar, the Trial Court interrupted the testimony and instructed the attorneys to approach for a bench conference. (Tr. p. 103, lines 6-8). The Trial Court then instructed the State to proceed with his line of questioning. (Tr. p. 103, lines 9-10). Martin ultimately testified that he heard gunshots from outside of the bar while he was inside the bar. (Tr. p. 104, lines 1-5).

On cross-examination, Martin testified that he was not aware of any documentation banning Appellant from the bar because "I wasn't the one who banned him, so I wouldn't be able to provide the documentation of that... I don't have the power to ban somebody[.]" (Tr. p. 110, lines 6-13).

Kerry Ross, who is a bartender and assistant manager at McCary's Bar and Grill, conceded on direct examination that he was not present for the shooting that occurred on August 22, 2019.

(Tr. p. 148, lines 7-11). The State then asked him, "But you were there a week or two prior?" Defense Counsel objected under Rule 404(b), SCRE. The Trial Court requested another bench conference, and Defense Counsel indicated his previous "objection of the prior act" during the earlier bench conference on this issue. (Tr. p. 148, lines 12-19).

In response, the State informed the Court, "He's going to say he kicked him out the week before and then subsequent to that, he went back inside and heard gunshots." The Trial Court replied, "Okay, I'll overrule your objection. The objection is overruled." (Tr. p. 148, line 22 – 149, line 1). Ross also claimed that he and Appellant were involved in a physical altercation a few weeks before the shooting.

Ross maintained Appellant arrived at the bar with a few people who did not have their IDs, and Ross denied entry to those people but allowed Appellant inside the bar. (Tr. p. 149, lines 9-11). Ross alleged that Appellant subsequently punched him in the face and left the bar. Ross also claimed that he informed Appellant that he was not allowed to return to the bar. (Tr. p. 150 lines 14-16). Appellant supposedly then walked to the back of the building where Ross heard gunshots. (Tr. p. 149, lines 13-16; p. 150, lines 9-20).

During cross-examination, Ross conceded that he did not call the police or file a police report after allegedly being punched in the face by Appellant and witnessing Appellant shoot a gun outside of a public business. Ross also admitted that he had not provided Appellant with any documentation placing him on a trespass notice to ban him from the property. Ross maintained that he had informed his manager and one of the bartenders on duty that night about the incident but had not documented it in any other way. (Tr. p. 152, line 7 – 153, line 1).

Defense Counsel again objected under Rule 404(b), SCRE, during the direct examination of Amircle Wright, who was allegedly present during both incidents. The Trial Court then asked

for a response from the State when Defense Counsel reiterated his objection under Rule 404(b), SCRE. The State replied, "Your Honor, this is the same content we've discussed previously. I believe he's just renewing his objection to it." The Trial Court overruled the objection. (Tr. 180, lines 13-24).

Wright testified that Appellant allegedly got into an altercation with a female in the bar, prompting Ross to intervene. (Tr. p. 181, lines 10-12). Wright then claimed that she was outside of the bar and witnessed Appellant shooting in the air. (Tr. p. 181, lines 15-24). Following a series of questions regarding the alleged prior incident, the State asked Wright, "And so in your statement to police, you said Tolliver [Wise] pulled out his gun because he knew what [Appellant] was going to do; is that correct?" Wright responded, "Yes, sir." (Tr. p. 182, lines 2-5). Notably, in response to a question regarding Appellant's actions on the night of August 22, 2019, Wright testified, "I heard gunshots. And *I'm thinking he was doing the same thing he did weeks prior, which is shooting in the air*...." (Tr. p. 186, lines 1-5) (emphasis added).

On cross-examination, Defense Counsel attempted to impeach Wright based on her prior inconsistent statement to police that Wise pulled his gun before Appellant started shooting, after Wright testified, "[Appellant] was shooting prior to that, prior to Tolliver [Wise] pulling his gun out *because we already knew what he was going to do due to the last incident.*" (Tr. p. 188, line 24 – 189, line 1) (emphasis added). Wright also admitted that she never called the police or filed a police report because "when he shot the gun up in the air that morning, my phone was in the bar on the charger." (Tr. p. 191, lines 11-25; p. 192, lines 1-4). Wright also conceded that she saw Appellant after the alleged prior shooting and did not call the police because he was "harmless" to her. (Tr. p. 192, lines 3-4).

Notably, Appellant testified that he did not shoot a gun during the prior incident and that he was never told that he could not come back to the bar. (Tr. p. 270, line 20 – 271, line 16). He did admit that, although there was an exchange of words, "[Ross] never told me you're banned, don't ever come back." (Tr. p. 271, lines 11-13).

The jury began deliberations at 10:24 a.m. on April 20, 2023, and the jury sent out a note at 1:20 p.m. (stating that they "have doubts for the self-defense on elements three and four. Need clarity. Number three, what is considered reasonable for the person? Please provide clarity. Do we have to have all elements to be considered self-defense?"). (Tr. p. 391, lines 5-14). The Trial Court recharged the law on self-defense and answered the questions contained in the jury note. The jury left the courtroom at 1:43 p.m. to continue deliberations and returned their verdicts at 3:21 p.m. (Tr. p. 400, lines 10-24).

ARGUMENT

I. THE TRIAL COURT ERRED BY ADMITTING EVIDENCE OF APPELLANT'S ALLEGED INVOLVEMENT IN A PRIOR SHOOTING AT THE SAME LOCATION BECAUSE THE STATE FAILED TO PROVE THE PRIOR BAD ACT BY CLEAR AND CONVINCING EVIDENCE, THE PROPENSITY EVIDENCE WAS NOT LOGICALLY RELEVANT TO A MATERIAL FACT AT ISSUE, AND THE STRIKING SIMILARITY OF THE EVIDENCE ENHANCED THE SUBSTANTIAL UNFAIR PREJUDICE TO APPELLANT.

Generally, evidence of a person's character is not admissible to prove the person acted "in conformity therewith on a particular occasion." Rule 404(a), SCRE. Under Rule 404(b), SCRE, evidence of a person's "other crimes, wrongs, or acts" are inadmissible to prove a person's general character "in order to show action in conformity therewith." However, evidence of other bad acts are admissible when that evidence tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; or (5) the identity of the person charged with the commission of the crime on trial. *See State v. Lyle*, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923).

The proponent of prior bad act evidence must demonstrate it has a legitimate purpose, "i.e., the evidence does something more than prove a person has propensity to commit crimes." *Johnson v. State*, 433 S.C. 550, 555, 860 S.E.2d 696, 699 (Ct. App. 2021). This Court recently explained the State's initial burden in seeking to admit prior bad act evidence against a criminal defendant *Johnson v. State*:

> In a criminal case, the State must convince the trial court that the prior bad act evidence is logically relevant to a material fact at issue in the case: "If it is logically pertinent in that it reasonably tends to prove a material fact in issue, it is not to be rejected merely because it incidentally proves the defendant guilty of another crime."

Id. (quoting State v. Lyle, 125 S.C. 406, 417, 118 S.E. 803, 807 (1923)). This Court also held that

trial courts are to apply the logical relevancy test with "rigid scrutiny." *Id.* at 556, 860 S.E.2d at 699.

Specifically, if the trial court concludes the prior bad act evidence serves a purpose other than to show the defendant's proclivity for criminal conduct and the purpose is one listed under Rule 404(b), then such evidence is admissible unless its "probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE; *see Johnson*, 433 S.C. at 556, 860 S.E.2d at 699. The danger of unfair prejudice is also enhanced when the prior bad act is "strikingly similar" to the one for which the appellant is being tried. *State v. Gore*, 283 S.C. 118, 121, 322 S.E.2d 12, 13 (1984).

Notably, if the prior bad act did not result in a prior conviction, the state must prove the prior bad act by clear and convincing evidence. *See Johnson*, 433 S.C. at 556, 860 S.E.2d at 699. Our Supreme Court explained that 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, and 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. *See State v. Fletcher*, 379 S.C. 17, 24, 664 S.E.2d 480, 483 (2008) (citation omitted).

Discussion

In this case, the Trial Court erred by admitting evidence of Appellant's alleged involvement in a prior shooting at the same location because the State failed to prove the prior bad act by clear and convincing evidence, the propensity evidence was not logically relevant to a material fact at issue, and the striking similarity of the evidence enhanced the substantial unfair prejudice to appellant. *See* Rules 403 and 404(b), SCRE; *see Johnson*, 433 S.C. at 556, 860 S.E.2d at 699; *Gore*, 283 S.C. at 121, 322 S.E.2d at 13.

"This type of prior bad act evidence is precisely what Rules 403 and 404(b) of the South Carolina Rules of Evidence seek to exclude from trials." *State v. Robinson*, 438 S.C. 421, 439, 882 S.E.2d 883, 893 (Ct. App. 2023) (citing *Johnson*, 433 S.C. at 559, 860 S.E.2d at 701 ("The rules of evidence recognize verdicts are still rendered by human hands, not the artificial workings of algorithms, and emotion has its place. Rule 403 ensures emotion stays in its place."); *Id.* at 556–57, 860 S.E.2d at 700 ("Rule 404(b) bars the use of prior bad act evidence to prove character, deeming it useless to the factfinder, for such use does not make any legitimate fact at issue more or less probable.")). "The purpose of the rules of evidence is to facilitate fair proceedings that bring forth the truth, not the whole truth, from its shroud of smoke and mirrors in a manner that will secure fair and just outcomes at trial." *Robinson*, 438 S.C. at 439, 882 S.E.2d at 893 (citing Rule 102, SCRE).

A. The State failed to prove Appellant's alleged involvement in a prior shooting at the same location by clear and convincing evidence.

The State failed to prove Appellant's alleged involvement in a prior shooting at the same location by clear and convincing evidence because none of the State's witnesses called the police or filed a police report about the incident. *See generally Johnson*, 433 S.C. at 556, 860 S.E.2d at 699. Martin admitted that he did not see Appellant shoot a gun during the prior incident because he was inside the bar when he heard gunshots. (Tr. p. 104, lines 1-5).

Wright, who also claimed to see Appellant shooting a gun during the prior incident, admitted that she also never called the police or filed a police report because her "phone was in the bar on the charger." (Tr. p. 191, lines 11-25; p. 192, lines 1-4). Wright acknowledged that she saw Appellant after the alleged prior shooting and did not call the police despite being an alleged eyewitness to the incident. Therefore, the Trial Court erred by admitting evidence of Appellant's alleged involvement in a prior shooting at the same location because the State failed to prove the prior bad act by clear and convincing evidence.

B. Appellant's alleged involvement in a prior shooting at the same location was not logically relevant to a material fact at issue.

Appellant's alleged involvement in a prior shooting at the same location was not logically relevant to a material fact at issue. *See* Rule 404(b), SCRE; *Johnson*, 433 S.C. at 556, 860 S.E.2d at 699 ("In a criminal case, the State must convince the trial court that the prior bad act evidence is logically relevant to a material fact at issue in the case."). Similar to this Court's recent decision in *State v. Robinson*, Appellant "admitted on the stand to shooting [the] Victim". *Robinson*, 438 S.C. 421, 882 S.E.2d 883 (Ct. App. 2023). Defense Counsel also informed the Trial Court that identity was not an issue when the issue was addressed pre-trial. (Tr. p. 43, lines 3-4).

Unlike in *Johnson*, motive and intent were not critical in connecting Appellant to the crime because this propensity evidence was unnecessary to show why Appellant shot into the bar or to dispel that Appellant acted in self-defense. *Id.*, 433 S.C. at 556, 860 S.E.2d at 699. Therefore, the the Trial Court erred by admitting evidence of Appellant's alleged involvement in a prior shooting at the same location because this propensity evidence was not logically relevant to a material fact at issue.

C. The striking similarity of Appellant's alleged involvement in a prior shooting at the same location enhanced the substantial unfair prejudice to Appellant.

The striking similarity of Appellant's alleged involvement in a prior shooting at the same location enhanced the unfair prejudice to Appellant and substantially outweighed any probative value. *See* Rule 403, SCRE; *State v. Kelley*, 319 S.C. 173, 177, 460 S.E.2d 370 (1995) ("It is well settled that evidence should be excluded when its probative value is outweighed by its prejudicial effect."). When comparing this Court's decision in *Robinson* to the facts in this case, "the State presented much evidence that was substantially prejudicial to [Appellant's] case and confusing to the jury." *Id.*, 438 S.C. at 438, 882 S.E.2d at 892.

The State presented numerous witnesses to testify about the alleged prior shooting and unrelated physical altercations with different people. (Tr. p. 149, lines 13-16; p. 150, lines 9-20). Specifically, Ross alleged that Appellant punched him in the face during the prior incident, and Wright testified that Appellant allegedly got into an altercation with a female in the bar during the prior incident. (Tr. p. 149, line 12; p. 181, lines 10-12). Notably, Wright's testimony amounted to the epitome of inadmissible propensity evidence: "*I heard gunshots. And I'm thinking he was doing the same thing he did weeks prior, which is shooting in the air... because we already knew what he was going to do due to the last incident.*" (Tr. p. 186, lines 1-5; p. 188, line 24 – 189, line 1) (emphasis added). Therefore, the Trial Court erred by admitting evidence of Appellant's alleged involvement in a prior shooting at the same location because the striking similarity of this propensity enhanced the unfair prejudice to Appellant and substantially outweighed any probative value. *See Gore*, 283 S.C. at 121, 322 S.E.2d at 13.

CONCLUSION

Based on the foregoing reasons, Appellant Ernest Bethel respectfully requests that this Court reverse his convictions and sentences and remand this case to the Richland County Court of General Sessions for a new trial.

Respectfully submitted,

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