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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Horry County

AUG 01 2013

Larry B. Hyman, Jr., Circuit Court Judge

S.C. Supreme Court

Opinion No. 5119 (S.C. Ct. App. filed 4/17/2013)
07-GS-26-3387, 3388, 3389, 3390

THE STATE,

PETITIONER/RESPONDENT,

V.

BRIAN K. SPEARS,

RESPONDENT/PETITIONER

APPELLATE CASE NO. 2010-162287

RETURN TO PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

ROBERT M. PACHAK
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ATTORNEY FOR RESPONDENT/PETITIONER.

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STATEMENT OF THE CASE

Respondent was convicted of murder and three (3) counts of assault and battery with intent to kill after a jury trial held before the Honorable Larry B. Hyman, Jr., on May 10 – 13, 2010, in Horry County. A sentence of thirty (30) years was imposed for murder and twenty (20) year sentences were imposed on the remaining charges.

Respondent appealed his convictions and submitted a final brief on September 12, 2011. Petitioner submitted its final brief on September 12, 2011. Oral argument was heard in the Court of Appeals on January 17, 2013. On April 17, 2013, the court issued an opinion remanding the case to the trial court for it to conduct an on-the-record balancing test under Rule 403, SCRE to determine whether the probative value of the prior bad act of a shooting was substantially outweighed by the danger of unfair prejudice.

On April 26, 2013, petitioner filed a petition for rehearing. On May 2, 2013, respondent filed a petition for rehearing. Both petitions for rehearing were denied on June 14, 2013. Respondent filed a petition for writ of certiorari on July 15, 2013. Petitioner filed a writ of certiorari on July 12, 2013.

This return follows.

BACKGROUND

The victim was shot and killed in Myrtle Beach while he was visiting there with some of the gang members he was with from Lumberton, North Carolina. Appellant, Jeffrey Bethea, and Nathaniel Douglas were in a rival gang also from Lumberton and they, too, were visiting in Myrtle Beach. No one was really quite sure who did the shooting. The police made a composite of the suspected shooter that resembled Jeffrey Bethea. Nathan Douglas testified for the State and implicated Bethea. Bethea testified for the State in exchange for more lenient treatment and implicated appellant. Appellant's defense was the Bethea was the one (1) shooter.

(R. p. 43, line 12 – p. 46, line 21; R. p. 110, line 13 – p. 111, line 11; R. p. 214, lines 2 – 25).

In an effort to prove that appellant was the shooter, the State wanted to put into evidence testimony from the victim's own sister that appellant shot the victim at the Walmart parking lot in Lumberton about a month prior to the shooting in Myrtle Beach. The trial court allowed the solicitor to put on the record that this was evidence of a prior bad act under Rule 404, SCRE. The solicitor failed to specify why the Walmart shooting was admissible under Rule 404(b). Instead, she merely made a rote recitation of all of the exceptions to State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923) (R. p. 186, line 18 – p. 187, line 14). Counsel has found in the past when a solicitor cannot specify the pertinent exception, the real motive is to prejudice the defendant with the prior bad act.

Appellant noted in his brief how the prior bad act was unfairly prejudicial under Rule 403, SCRE as “[e]vidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis.” State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146 (1991). A jury in this case could unfairly conclude that if appellant shot the victim once, he must also be the one who shot him a second time. Our case law has taught us that when “the previous alleged bad act is strikingly

similar to the one for which the appellant is being tried, the danger of prejudice is enhanced.” State v. Gore, 283 S.C. 118, 322 S.E.2d 12 (1984).

ARGUMENT I

The issue of the prior bad act, a shooting allegedly by respondent at petitioner at a Walmart, was properly preserved for appellate review.

The argument on direct appeal was that the trial court erred in admitting evidence that respondent shot the victim about a month prior to the shooting death for which respondent was on trial because it was unfairly prejudicial under Rule 403, SCRE. (Petitioner's app. p. 6).

At the trial level, defense counsel argued that respondent had not been convicted of the shooting. It was a prior bad act. There was no clear and convincing evidence of respondent's guilt. There was a video of the shooting, but respondent could not be identified. And, it was more prejudicial than probative. (R. p. 159, line 20 – p. 160, line 1). The next day at trial, defense counsel reiterated her Rule 403, SCRE argument. (R. p. 182, lines 7 – 14). Appellate counsel does not know how the issue could have been better preserved. The panel at the Court of Appeals had no problem with the issue being preserved for appellate review. Neither did the Court sitting *en banc*.

ARGUMENT II

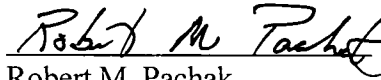
The Court of Appeals erred in remanding respondent's case for the trial court to conduct a balancing test under Rule 403, SCRE on the admissibility of a prior bad act when the Court of Appeals already made a determination that the error was not harmless.

In the opinion remanding this case to the trial court to conduct a balancing test under Rule 403, SCRE, the Court of Appeals found and concluded that it was “unable to say that the admission of the prior bad act testimony was harmless error.” (State’s app. p. 43). If the error was not harmless, respondent’s conviction should be reversed. Remanding the case for a Rule 403 balancing test would only lead to prejudice and confusion. The trial judge should not have to sit in judgment of himself.

CONCLUSION

Petitioner's writ should be denied and respondent should be given a new trial.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR RESPONDENT/PETITIONER.

This 1st day of August, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County
Larry B. Hyman, Jr., Circuit Court Judge

Opinion No. 5119 (S.C. Ct. App. filed 4/17/2013)
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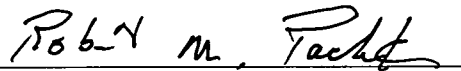
V.

BRIAN K. SPEARS,

RESPONDENT/PETITIONER.

CERTIFICATE OF SERVICE

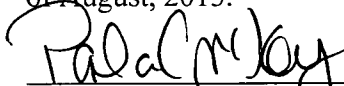
I certify that a true copy of the return to petition for writ of certiorari in this case has been served on Brendan J. McDonald, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and the S.C. Court of Appeals, 1015 Sumter Street, Columbia, SC 29201, this 1st day of August, 2013.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR RESPONDENT/ PETITIONER

SWORN TO BEFORE ME this 1st day
of August, 2013.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: July 24, 2022