

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Orangeburg County

Diane Schafer Goodstein, Circuit Court Judge

RECEIVED

AUG 02 2013

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

ROMEO BROWN,

APPELLANT

APPELLATE CASE NO. 2012-212217

INITIAL BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS	1
TABLE OF AUTHORITIES	2
STATEMENT OF ISSUES ON APPEAL.....	3
STATEMENT OF THE CASE	4
ARGUMENT	7
CONCLUSION.....	15

TABLE OF AUTHORITIES

Cases

Dollard v. Dollard's Executor, 16 S.C.L. (Harp.) 564 (1826)..... 14

State v. Allen, 266 S.C. 468, 224 S.E.2d 881 (1976). 13, 14

State v. Brock, 130 S.C. 252, 126 S.E. 28 (1924)..... 12, 13

State v. Byers, 277 S.C. 176, 284 S.E.2d 360 (1981)..... 12

State v. Dubose, 288 S.C. 226, 341 S.E.2d 785 (1986)..... 12, 13

State v. Fletcher, 379 S.C. 17, 664 S.E.2d 480 (2008) 11

State v. Hale, 284 S.C. 348, 326 S.E.2d 418 (Ct.App.1985) 13, 14

State v. Harvey, 275 S.C. 225, 268 S.E.2d 587 (1980)..... 14

State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923)..... 10, 12, 13

State v. McClellan, 323 S.E.2d 772 (S.C.1984). 14

State v. Murphy, 48 S.C. 1, 25 S.E. 43 (1896) 14

State v. Nelson, 331 S.C. 1, 501 S.E.2d 716 (1998)..... 10

Statutes

S.C. Code §17-25-45 4

Rules

Rule 403, SCRE 11

Rule 404(b), SCRE 10

STATEMENT OF ISSUES ON APPEAL

1. Did Appellant's testimony that he did not "know" the deceased open the door to allow the State to question Appellant about a prior altercation with the deceased that the trial court previously ruled inadmissible pursuant to Rule 404(b)?

2. Did the trial court err in allowing the State to present reply testimony about a prior altercation between Appellant and the deceased as impeachment evidence when the prior altercation was a collateral matter to the case at trial and the trial court erred in allowing the State to question Appellant about the prior altercation?

STATEMENT OF THE CASE

In March of 2011, the Orangeburg County Grand Jury indicted Brown for murder, indictment #2011-GS-38-0012. In April of 2012, the Orangeburg County Grand jury indicted Brown for possession of a firearm by a person convicted of a violent crime, indictment #2012-GS-38-0792. On May 22, 2012, Brown proceeded to jury trial before the Honorable Diane Schafer Goodstein. Byron Gipson represented Brown at trial. Donald Sorenson prosecuted the case. On May 30, 2012, the jury found Brown guilty as charged. Judge Goodstein, pursuant to S.C. Code §17-25-45, sentenced Brown to life without parole for murder and five years concurrent on the firearm charge. A timely notice of intent to appeal was served on June 1, 2012. This appeal follows.

STATEMENT OF FACTS

On October 27, 2010, at approximately 8:57 PM Alexander Travis Harrison was fatally shot two times in Randy Ryant's front yard. Randy Ryant is married to Appellant's sister Tammy Ryant. The Ryant front yard was a gathering place and several people were in the yard at the time of the shooting. Lieutenant Craig Davis with the Orangeburg County Sheriff's Office was the first officer on the scene. (Tr. pp. 80-81; p. 99, lines 5-8). Witnesses Vandy Morgan, Joe Thomas, Isaak Morgan and Brandy Mack told Lt. Davis that the shooter was an unknown black male who was six feet to six feet two inches tall and weighed between two hundred (200) and two hundred and twenty (220) pounds. (Tr. p. 102, line 10 – p. 103, lines 1-25). At trial Joe Thomas and Brandy Mack testified that Appellant Romeo Brown was the shooter. (Tr. p. 152, lines 1-15; p. 291. lines 13-25). Two additional witnesses who were not interviewed by Lt. Davis on the night of the shooting, Ulysses Daniels and Shawn Guinyard, testified at trial that Brown was the shooter. (Tr. p. 252, lines 1-13; p. Tr. p. 318, line 21 –p. 319, lines 1-5). Guinyard, Thomas' and Mack identified Brown in photo line-ups¹ shown to them by Lieutenant James Shumpert of the Orangeburg County Sheriff's Office. (Tr. pp. 457-463). Daniels also identified Brown in a photo line-up. (Tr. p. 256, line 11 – p. 257, 258, lines 1-25). Thomas testified that after the shooting the shooter ran away. (Tr. p. 166, lines 21-25).

Appellant presented an alibi defense. Appellant testified that on October 27, 2010, the day of the shooting, he spent the afternoon in Mr. Napp's yard next to the Four Way Convenience Store. (Tr. p. 704, lines 1-7). As it got dark, Appellant's nephew, Tedriks Green, picked him up, drove to the Biddie Banquet where they got some food and then went back to Green's house to watch the World Series. (Tr. pp. 704-706). Appellant testified that

he fell asleep watching the baseball game. (Tr. p. 707, lines 11-19). Appellant's nephew woke him up and took him home before the game was over. (Tr. p. 707, line 17 – p. 708, lines 1-10). The nephew, Tedriks Green's testimony at trial was consistent with Appellant's testimony. (Tr. p. 619, line 6 – p. 620, 621 lines 1-23). The nephew testified that he took his uncle home around 11:00 PM.

Appellant testified that after his nephew dropped him off he went next door to check on his neighbor, Erika Smith. (Tr. p. 708, line 7 – p. 709, lines 1-11). Appellant arrived at his neighbor's house around 11:00 PM. (Tr. p. 745, line 18 – p. 746, lines 1-8). Appellant testified that his neighbor and her friend were playing cards and they tried to teach Appellant how to play. (Tr. p. 709, lines 12 – 22). Appellant eventually went home and went to bed. (Tr. p. 710, lines 23 – p. 711, lines 1-25). The neighbor, Erika Smith's testimony at trial was consistent with Appellant's testimony. (Tr. p. 643, line 23 – p. 644, 645, 646, lines 1-25). The neighbor testified that Appellant stayed at her house for about thirty minutes before he went home. (Tr. p. 645, lines 16-23).

Appellant testified that on September 15 – 18, 2010, he was treated for a significant injury to his leg requiring seventeen staples to close the wound. (Tr. pp. 685-696). Appellant was released from wound care on October 19, 2010, but still required the use of a cane to walk. (Tr. p. 699, line 2 – p. 700, lines 1-18). Appellant's sister, Tammy Ryant and his neighbor, Erika Smith both testified that in October of 2010, Appellant required the use of a cane. (Tr. p. 599, line 6 – p. 600, lines 1-23; p. 645, line 24 – p. 646, lines 1-6).

The State presented no forensic evidence linking Appellant to the shooting of Harrison. The State's case against Appellant was based solely on eye-witness identifications. Appellant was arrested on November 4, 2010.

¹ No objection was made to the identifications. 6

ARGUMENT

1. The trial court erred in finding that Appellant's testimony that he did not "know" the deceased opened the door to allow the State to question Appellant about a prior altercation with the deceased that the trial court previously found inadmissible pursuant to Rule 404(b)?

During the trial the State, *in camera*, proffered the testimony of Ulysses Daniels in regard to an altercation between Appellant and the deceased in the Ryant yard about four months earlier. (Tr. pp. 233-239). Daniels testified, "And that's when the two of them hooked up, and Romeo pushed Alex back toward the car that was parked, an old car that was parked not too far from them. And that's when he took the gun and hit him across the head with it." (Tr. p. 235, lines 13-17). Daniels testified that the two of them continued to struggle over the gun until Randy Ryant came out and told them he was going to call the police. (Tr. p. 235, line 17 – p. 236, lines 1-2). The fight ended, another person took the gun and the two men left. (Tr. p. 236, lines 2-7). Daniels testified that the fight was the result of Alex taking a bag of marijuana from Appellant's nephew. (Tr. p. 236, lines 13-18).

The State argued that the testimony about the prior altercation was admissible to show identity and motive pursuant to Rule 404(b), SCRE. Alternatively, the State argued that the testimony was proper to show animosity between the parties. (Tr. p. 239, line 5 – p. 240, lines 1-10). The judge found the testimony inadmissible as it failed to prove identity or motive. (Tr. p. 241, line 9 – p. 242, lines 1-20).

During cross examination Appellant denied knowing the deceased. (Tr. p. 737, lines 20-25). The State, outside of the presence of the jury, argued that Appellant's testimony that he did not know the deceased opened the door to allow questioning about the alleged prior altercation. (Tr. p. 738, lines 1-22). Appellant objected and argued:

Your Honor, in each of those questions he asked a follow up question. He asked, you know, did you know Isaac Bernard, and he said, well, I don't really know him. He said, well did you know – and he ask him a follow up question, and he'd have an opportunity to answer that follow up question. I mean when you talk about know, some people talk of know as, have you had conversations with him, do you sit down and talk to him, do you all break bread together. I mean he didn't ask him if he'd ever had a conversation with him, he didn't ask him that question which is a follow up he asked of the others when he gave a similar answer. So, I think he's entitled to follow that question up and, from that point and see if there's an answer that he gives other than no, or at least define what he means by no. That would be my position Your Honor.

(Tr. p. 738, line 24 – p. 739, lines 1-13). The trial court, noting appellant's exception, allowed the State, for impeachment purposes, to question Appellant about the prior altercation. (Tr. p. 740, line 11 – p. 741, lines 1-4). The trial court erred. First, the trial court should have allowed the Appellant to explain his answer. Second, even without Appellant's explanation, any impeachment should have been limited to establishing that Appellant "knew" the deceased without reference to the prior altercation ruled inadmissible by the trial court. The State should not have been permitted to ask Appellant about the prior altercation.

After the ruling the State asked Appellant, "Mr. Brown, I think my last question where I left off is, I had asked you whether you knew Mr. Harrison, Alex Harrison, the victim in this case, and I believe your was that no you did not know him, is that correct?"

(Tr. p. 741, lines 11-14). The following then took place in response to the State's question:

A. Yes, sir.

Q. Okay.

A. Um, can I say something, sir?

Q. Well, I have one other question, I was getting, kind of just getting us back on track of where we were ok?

A. Okay.

(Tr. p. 741 lines 15-20). Counsel for Appellant again asked that Appellant be allowed to explain his answer stating, “Well, could he clarify, I guess, what he was about to say? I’m not sure he’s going to say it.” (Tr. p. 741, lines 21-22). Appellant was not allowed to explain his answer. (Tr. p. 741, line 23 – p. 742, lines 1-4).

The State then asked Appellant, “Alright, Mr. Brown, let me ask you then, back on June the sixth of Two thousand ten, so some four and a half months prior to this, out at the same address, your sister and brother-in-law’s house on Wingfield, did you on that date hit Mr. Harrison up side the right side of his cheek with a hand gun?” (Tr. p. 742, lines 5-10). Appellant replied, “No.” (Tr. p. 742, line 11). The State then asked Appellant if he denied having an altercation with Harrison about a bag of marijuana belonging to Appellant’s nephew. Appellant denied the altercation. (Tr. p. 742, lines 14-17).

The State should not have been permitted to question Appellant about the prior altercation. During the re-direct examination Appellant provided the explanation that he was not allowed to provide before the State asked about the prior incident. Appellant admitted that he was familiar with the deceased but did not know him well. (Tr. p. 763, line 11 – p. 764, lines 1-10). Appellant testified, “That’s the kind of knowing I was thinking that he was talking about, knowing as far as knowing him like that, like knowing their family, know that they got three kids or they got two kids, or what . . .” (Tr, p, 764, lines 11-14). If Appellant had been allowed to explain his answer, as requested, admitting that he was familiar with the deceased but did not know him well, the door the State argued had been opened would have remained closed.

The trial court erred in not allowing Appellant to explain his answer. The trial court further erred in allowing the State to question Appellant about the prior altercation. Any impeachment testimony offered by the State should have been limited to whether appellant “knew” the deceased without reference to the prior altercation as previously ruled inadmissible by the trial court. Although Appellant denied the prior altercation, the questioning suggests that Appellant committed a prior bad act that was found inadmissible pursuant to Rule 404(b).

The trial court correctly found that evidence of the prior altercation was inadmissible pursuant to Rule 404(b), SCRE. (Tr. p. 214, line 9 – p. 242, lines 1-17). The trial court specifically found that evidence of the prior altercation did not show identity or motive. Once Appellant denied knowing the deceased, which he later explained as discussed above, the State could have presented testimony, without reference to the prior incident, that Appellant knew the deceased. Questioning Appellant about the prior incident is not impeaching of whether Appellant knew the deceased.

Testimony about the prior incident constitutes improper character evidence pursuant to rule 404(b), SCRE. Evidence of other crimes or bad acts is not admissible to show criminal propensity to commit the crime charged or to demonstrate the bad character of the accused. Rule 404(b), SCRE; State v. Nelson, 331 S.C. 1, 6–7, 501 S.E.2d 716, 718–19 (1998); State v. Lyle, 125 S.C. 406, 415–16, 118 S.E. 803, 807 (1923). However, such evidence may 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. “To be admissible, the bad act must logically relate to the crime with which the defendant has been charged.” State v. Fletcher, 379 S.C. 17, 664 S.E.2d 480,

483. “If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing.” *Id.* “Even if the 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.” *Id.* (citing Rule 403, SCRE).

The trial court properly ruled that testimony about the prior incident was inadmissible pursuant to rule 404(b). (Tr. p. 241, line 9 – p. 242, lines 1-20). Appellant’s initial statement that he did not “know” the deceased did not open the door to allow the State to question Appellant about the prior incident. The trial court erred in allowing the State to question the Appellant about the prior violent altercation. The error was not harmless because it was highly prejudicial and was further compounded by the fact that the State was allowed to impeach Appellant’s testimony denying the prior altercation as discussed in issue two.

2. The trial court erred in allowing the State to present reply testimony about a prior altercation between Appellant and the deceased as impeachment evidence when the prior altercation was a collateral matter to the case at trial and the trial court erred in allowing the State to question Appellant about the prior altercation.

In reply the State called Randy Ryant, Appellant’s brother in law. Appellant objected to the reply testimony of Ryant. (Tr. p. 776, line 9 – p. 777, 778, lines 1-2). Counsel for Appellant stated, “I think he, I think the question was, had her ever hit Mr. Harrison [the deceased] with a pistol, and he said, no, he hadn’t.” The judge responded, “And did you all

have a fight? No. Did you have an altercation? No. Did y'all have an altercation over pot that belonged to your nephew, I think, and he said, no. And as I recall, his answers to everything that had to do with the alleged incident four months earlier was, no." (Tr. p. 778, lines 10-14). The judge went on to state, "And this is not character, what we're not, we're not cross-examining on the issue of character, this is plain old garden variety impeachment. Opened the door, I don't know him, yes, you do." (Tr. p. 778, lines 22 – 25). The judge then quoted the Oxford English dictionary for the definition of "know" and then found the rebuttal testimony of Randy Ryant proper. The trial court erred.

In State v. Dubose, 288 S.C. 226, 231-232, 341 S.E.2d 785, 788 (1986) the South Carolina Supreme Court wrote:

We held in State v. Brock, 130 S.C. 252, 126 S.E. 28 (1924) that whether a matter is collateral to the issues involved is determined by the answer to this question:

Would the cross-examining party be entitled to prove the fact as a part of, and as tending to establish, his case? If he would be allowed to do so, the matter is not collateral; but, if he would not be allowed to do so, it is collateral. Collateral matters, in this sense, are such as afford no reasonable inference as to the principal matter in dispute. 130 S.C. at 254, 126 S.E. at 29.

Here, by Chandler's own admission, the statement attributed to DuBose was made at least 11 years prior to trial. It alleges the commission of a prior bad act not recognized as an exception in Lyle. See also State v. Byers, 277 S.C. 176, 284 S.E.2d 360 (1981).

Therefore, the State, in its case in chief, could not have presented this evidence against DuBose.

Moreover, where, as here, a witness denies an act involving a matter collateral to the case in chief, the inquiry ends. The inquiring party is not permitted to introduce evidence in contradiction or impeachment. State v. Hale, 284 S.C. 348,

326 S.E.2d 418, 421 (Ct.App.1985); State v. Allen, 266 S.C. 468, 482, 224 S.E.2d 881, 886 (1976).

Finally, in its brief the State contends the Chandler testimony was admissible to impeach DuBose's credibility as to his testimony denying knowledge of "what marijuana was and looked like."

We disagree. DuBose did not so testify specifically, and nothing in the record infers the State's characterization of his testimony.

Clearly, the testimony of Chandler should have, upon objection, been excluded. Its devastating prejudicial effect requires no comment.

As in Brock, the prior altercation constituted a prior bad act not recognized as an exception pursuant to Rule 404(b) and State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).

The State should not have been allowed to question appellant about the prior altercation, as discussed in issue one. The prior altercation is collateral to the case at trial. Once appellant denied the prior altercation, the inquiry should have stopped because the prior altercation was a collateral matter and the State should not have been allowed to introduce testimony in contradiction or impeachment.

In Dubose the defendant was on trial for manufacturing and trafficking marijuana. At trial Dubose denied making a statement to a neighbor, eleven years earlier, about growing marijuana. In reply, the State, over objection, called the neighbor who testified that Dubose admitted, eleven years earlier, growing marijuana. The South Carolina Supreme Court found that the neighbor's testimony was improper as it was collateral to the case in chief and did not meet an exception under Lyle. The Court reversed finding the testimony devastatingly prejudicial.

In Hale, 284 S.C. 348, 352-353, 326 S.E.2d 418, 421 (Ct.App. 1985) the South Carolina Court of Appeals wrote:


There are three ways to impeach the credibility of a witness by collateral evidence. The first is by showing he has been convicted of a crime involving moral turpitude, not too remote in time. State v. Harvey, 275 S.C. 225, 268 S.E.2d 587 (1980). The second is by showing he has been guilty of bad conduct that was not the subject of a conviction. This inquiry into matters collateral to the case in chief is limited to cross examination of the witness sought to be impeached; if the witness denies the act, the inquiry ends. State v. Allen, 266 S.C. 468, 224 S.E.2d N.E.2d 529 (1970); C. McCormick, EVIDENCE, Section 42, at 92 (3d ed. 1984). Finally, testimony bearing on the witness's general reputation for truth and veracity may be introduced. In South Carolina this testimony must take a peculiar form first prescribed in 1826. Dollard v. Dollard's Executor, 16 S.C.L. (Harp.) 564 (1826). Its admissibility was last challenged nearly a century ago in State v. Murphy, 48 S.C. 1, 25 S.E. 43 (1896), and today its propriety is not questioned. See, e.g., State v. McClellan, 323 S.E.2d 772 (S.C.1984).

As discussed in issue one, the State should not have been permitted to ask Appellant about a prior altercation with the deceased. Once the State was improperly allowed to ask about the prior altercation, as discussed as the second way to impeach in Hale – by showing guilt of bad conduct not the subject of a conviction – the inquiry should have ended once Appellant denied the prior altercation. The judge erred in allowing the reply testimony of Randy Ryant in regard to a prior altercation between Appellant and the deceased. The testimony was highly prejudicial and requires reversal.

CONCLUSION

Based on the above argument, Brown's convictions should be reversed and the case remanded for a new trial.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 2nd day of August, 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Orangeburg County

Diane Schafer Goodstein, Circuit Court Judge

RECEIVED

AUG 02 2013

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

ROMEO BROWN,

APPELLANT

APPELLATE CASE NO. 2012-212217

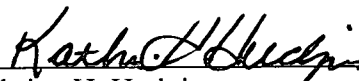
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictments and sentencing sheets;
- (2) Trial transcript pages 39 – 169; 177 – 492; 496-768; 776-944.

I certify that this designation contains no matter which is irrelevant to this appeal.

August 2, 2013


Kathrine H. Hudgins
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
AUG 02 2013
SC Court of Appeals

Appeal from Orangeburg County
Diane Schafer Goodstein, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

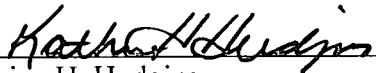
ROMEO BROWN,

APPELLANT

APPELLATE CASE NO. 2012-212217

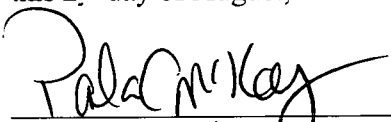
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and also served upon Mr. Romeo Brown, #185544 McCormick Correctional Institution 386 Redemption Way McCormick, SC 29899, this 2nd day of August, 2013.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 2nd day of August, 2013.


_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.