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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court Of General Sessions
The Honorable William H. Seals, Circuit Court Judge

Appellate Case No. 2023-0000261

THE STATE, Respondent,

v.

THOMAS HENRY BROWN, JR., Appellant.

FINAL BRIEF OF RESPONDENT

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The trial court did not abuse its discretion in admitting evidence of Appellant's other solicitation because the evidence showed the complete story of events, was admissible as other bad act evidence, and its probative value was not substantially outweighed by the danger of unfair prejudice.

STATEMENT OF THE CASE

A Charleston County Grand Jury indicted Appellant Thomas Henry Brown, Jr. for criminal solicitation of a minor. He proceeded to a jury trial on May 31, 2022, before the Honorable William H. Seals. Brown was convicted as indicted and sentenced to eight years' incarceration. This direct appeal follows.

STATEMENT OF FACTS

In June 2018, for Minor's fifth grade graduation, Minor visited her four cousins and aunt. (R. 83-85). At this time, Aunt was living with her boyfriend Thomas Brown, Jr. (Appellant) in a hotel.[1] (R. 83-85; 153). This was the first time that Minor had visited Aunt and Appellant overnight without her parents. (R. 84). On Saturday, they met Minor's grandparents at the beach (Isle of Palms). (R. 85; 130). After spending time on the beach, they saw a snake during the walk back to the car. (R. 85). Minor testified that while the crowd was occupied, she went off to the side to brush sand off her feet. (R. 85). She stated that while she was doing this, Appellant walked up to her, touched her arm, and said "Can you suck my dick?" (R. 85-87). She testified Appellant made the statement quietly and she did not think anyone else heard Appellant. (R. 91). At that time, Minor did not tell anyone; because she was worried about her aunt's temper. (R. 91-92). Minor testified she was not able to communicate with anyone via her phone because it only worked when connected to Wi-Fi. (R. 92).

The group went back to the hotel to wash off. (R. 92). After washing off they went to a bonfire. (R. 92-93; 122). Minor and her cousin both testified that after spending some time at the bonfire they went back to the car to get candy and water. (R. 93; 123). She stated that while she was at the car Appellant touched her hand again and repeated his exact statement from earlier. "Will you suck my dick?" (R. 93-94). Minor testified that Appellant made the statement as Cousin was shutting one car door, and Minor was opening another. (R. 94). The cousin testified that Minor was not as playful and goofy as she normally was. (R. 124). After the bonfire they all went back to the hotel. (R. 95). At that time, Minor reached out to her mother and informed the mother she had something to tell her and wanted to come home in the morning. (R. 95-96). In the

[1] Minor's aunt is named Monique Williams; she is the sister of Minor's Mother. (R. 82).

morning, Appellant drove Minor and the cousins' home, dropping the cousins off first. (R. 97). Once Minor was home, she told her mother, and they went to the police. (R. 97-98).

At trial, Appellant objected to the admission of testimony regarding Appellant's second solicitation of Minor at the bonfire. (R. 53). Appellant argued that the evidence was inadmissible under 404(b), SCRE. (R. 56). Appellant further argued that the other bad act was not admissible because it was not proven by clear and convincing evidence. (R. 56-57). Appellant also argued that none of the 404(b) exceptions were applicable. (R. 57). Lastly, Appellant argued that the evidence's probative value was substantially outweighed by the danger of unfair prejudice. (R. 62-63).

The State argued that it was a continuous course of conduct, given that the solicitations were similar in nature, time, and circumstance. (R. 53). The State argued that it was admissible under 404(b) as a common scheme exception. (R. 53). The Court found the evidence to be relevant. (R. 63). Next, the Court noted the testimony showed the event happened on the same day, with the same parties, and with the same wording. (R. 63-64). The Court found the evidence admissible to show motive, common scheme, absence of mistake, and intent. (R. 64).

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law. State v. Asbury, 328 S.C. 187, 193, 493 S.E.2d 349, 352 (1997). The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice. State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845 (2006). A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. State v. Adams, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003). Great deference is given to the trial court's judgment. State v. Hamilton, 344 S.C. at 357, 543 S.E.2d at 593 (2001) (overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000).

ARGUMENT

The trial court did not abuse its discretion in admitting evidence of Appellant's other solicitation because the evidence showed the complete story of events, was admissible as other bad act evidence, and its probative value was not substantially outweighed by the danger of unfair prejudice.

The trial court correctly admitted Minor's testimony regarding the other solicitation because it established the complete unfragmented story. The testimony also established with clear and convincing evidence, that Appellant engaged in a bad act that showed his intent, motive, common plan, and lack of any mistake. Further, the probative value of the act was not substantially outweighed by the danger of unfair prejudice because the comments did not encourage a decision on an emotional basis. Lastly, any error was harmless because Minor's testimony regarding the other bad act was so closely related to her testimony regarding the incident in question.

Under the res gestae theory, sometimes evidence of other bad acts can be an integral part of the crime charged, and evidence of the act may be needed to aid the fact finder. State v. Wood, 362 S.C. 520, 528, 608 S.E.2d 435, 439 (Ct. App. 2004). There must be temporal proximity to the prior act; showing the other act to be closely related to the charged crime. Id. The res gestae theory, or the inextricably intertwined doctrine, recognizes that "evidence inextricably intertwined with charged conduct is, by its very terms, not other bad acts and therefore, does not implicate Rule 404(b) at all." United States v. Gorman, 613 F.3d 711, 717–18 (7th Cir. 2010). This allows the prosecution to present a comprehensive story of the events, including acts closely linked in point of time and space. Handbook of Fed. Evid. § 404:5 (9th ed. 2023).

Character evidence is not generally admissible, but under certain circumstances other bad acts may be admissible. Rule 405(b), SCRE. These acts presented may have been prior to or subsequent to the crime charged. State v. Atkins, 309 S.C. 542, 424 S.E.2d 554 (1992). Evidence

of other wrong acts can be introduced to show motive, intent, identity, common scheme or plan, or absence of mistake or accident. State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923), incorporated in Rule 404(b), SCRE. Evidence is relevant if it tends to establish or make more or less probable the matter in controversy. Rule 401, SCRE; State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001). There must be more than simply a general similarity between the act and charged offense. State v. Pierce, 326 S.C. 176, 485 S.E.2d 913 (1997).

"If the defendant was not convicted of the prior crime, evidence of the [other] bad act must be clear and convincing." State v. Gaines, 380 S.C. 23, 29, 667 S.E.2d 728, 731 (2008). "[A] factfinder's belief in a single witness's testimony alone can be sufficient to satisfy a party's burden to prove a fact by clear and convincing evidence." Silva v. Dos Santos, 68 F.4th 1247, 1255 (11th Cir. 2023); see also In re Emilee K., 153 A.3d 487, 497 (R.I. 2017) (testimony of a single witness can support a finding of fact by clear and convincing evidence).

Our Supreme Court has upheld the admission of other acts when the act indicates a continuousness of the conduct. State v. Richey, 88 S.C. 239, 70 S.E. 729, 730 (1911). In Richey, appellant was convicted of having carnal knowledge of a girl under fourteen. Id. 239, 70 S.E. 2d 729. The Richey Court affirmed the admission of testimony describing that nature of the relationship and how it continued on after victim had turned fourteen. Id. 239, 70 S.E. 2d 730. The Court considered the admissibility of the evidence under a rule that was substantially similar to our current Rule 404(b), SCRE. The Richey Court applied a test from The New York Court of Appeals, stating:

> Generally speaking, evidence of other crimes is competent to prove the specific crime charged, when it 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; (5) the identity of the person charged with the commission of the crime on trial.

Richey, 239, 70 S.E. 2d 730 (quoting People v. Molineux, 61 N. E. 294). The Court affirmed the admission of testimony because it was admissible to show continued intercourse, between the same parties, in appellant's home. Id.

Our courts have admitted evidence of conversations as 404(b) evidence. State v. Beck, 342 S.C. 129, 536 S.E.2d 679 (2000) (affirming admission of evidence that Defendant had talked of doing the same sort of crime four months earlier to show intent); State v. Gilmore, 396 S.C. 72, 719 S.E.2d 688 (App. 2011) (affirming admission of evidence that Defendant told Victim during rape that he'd killed before and would kill again, to show his intent).

When our courts have been hesitant to admit evidence of a prior bad act it has been when there is no connection between incidents. State v. Douglas, 302 S.C. 508, 397 S.E.2d 98 (1990) (evidence that Defendant had pulled the same gun on another person while horseplaying was not admissible because no connection shown between the two incidents); State v. Hough, 325 S.C. 88, 480 S.E.2d 77 (1997) (evidence Defendant had committed prior thefts was not admissible since there was no evidence showing any similarity between the previous crimes and the current one); State v. Humphries, 346 S.C. 435, 551 S.E.2d 286 (Ct. App. 2001) (finding the State cannot use evidence of prior drug transactions that are similar to the charged offense but are otherwise unconnected).

Evidence of prior bad acts offered under one of these exceptions may still be excluded if the prejudicial effect outweighs the probative value. Rule 403, SCRE; State v. Garner, 304 S.C. 220, 403 S.E.2d 631 (1991); State v. Johnson, 439 S.C. 331, 342, 887 S.E.2d 127, 133 (2023) (evidence considered for admission under res gestae theory must also satisfy Rule 403 balancing). Probative value is the tendency of evidence to establish the proposition it is offered to prove. State v. Thompson, 420 S.C. 386, 398 803 S.E.2d 44, 50 (Ct. App. 2017). It is the

weight that a piece of evidence will carry in helping the jury make a determination. "The more essential the evidence, the greater its probative value." Id. "All evidence is meant to be prejudicial; it is only unfair prejudice which must be avoided." State v. Bratschi, 413 S.C. 97, 115, 775 S.E.2d 39, 49 (Ct. App. 2015). Evidence that is unfairly prejudicial is evidence that suggests a decision on an improper basis. State v. Holder, 382 S.C. 278, 290, 676 S.E.2d 690, 697 (2009) (quoting State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991)).

Here, the evidence of Appellant's other solicitation is admissible under the res gestae doctrine. The two solicitations are so inextricably intertwined that the State needed to present the relevant evidence to tell the complete unfragmented story. The two acts occurred on the same day mere hours apart, between the same parties, and using the same words satisfying the temporal proximity requirement. Cf. State v. Johnson, 439 S.C. 331, 342, 887 S.E.2d 127, 132 (2023) (finding the temporal proximity requirement met when evidence established an unbroken thirteen-hour timeline of violence before Appellant attempted to break Victim's neck). The other solicitation is so intertwined with the charged offense that it is necessary to show the full context of the incident.

Even if the act is not admissible under the res gestae theory, it is admissible as an other bad act. The court properly found that the act shows a motive, common plan, absence of mistake, and intent. First, Appellant used the exact same words in both instances, showing the motivation he had, the intent behind his solicitation, a common scheme, and an absence of any mistake. Next, the subsequent act took part mere hours after the first solicitation, showing Appellant's intent in the act, common scheme, the lack of any mistake, and the continuous conduct. After all, the solicitor stated that if the act were not in a different county, it all would have been included in one indictment. (R. 53). Evidence is mostly excluded when there is a lack of connection

between the acts. Unlike Douglas, Hough, and Humphries there is a substantial connection between the acts here. There is a strong connection between the two acts here, in that it was the same parties, the same exact words, and on the same day.

Next, under Gaines the act must be shown by clear and convincing evidence. Here, the trial court did not abuse its discretion in finding the evidence to be clear and convincing. As noted in Silva, a single credible witness can satisfy the clear and convincing standard. Here, the trial court found the witness credible, as did the jury. The jury convicted Appellant largely based upon the testimony of Minor. As stated by Appellant "Despite the presence of seven other people around the two vehicles, no one else heard Appellant's alleged statements." (Appellant's Brief at p. 4). The State produced credible testimony that satisfied its burden of proof.

Lastly, the court did not abuse its discretion in finding the probative value of the testimony was not substantially outweighed by the danger of unfair prejudice. First, as noted by the trial court, the evidence was probative to show intent, motive, lack of mistake, and common plan. Also, the testimony shows continuous conduct that speaks to the nature of the relationship. Testimony from witnesses corroborates parts of the testimony of Minor. Minor's cousin recalled the snake, going back to the car with Minor, and that Minor was not as playful or goofy as she ordinarily was. (R. 122-124). Minor's Aunt recalled going to the beach, the snake, and Minor going to the car at the bonfire. (R. 145; 149). The evidence has a tendency to show that Appellant engaged in solicitation by showing the complete story of events. Lastly, there is a very low ability for the evidence to be unfairly prejudicial. All evidence produced by the State is designed to be prejudicial towards the defense, only unfair prejudice is considered here. The evidence presented by the State cannot be determined to be unfairly prejudicial because it is substantially similar to the crime charged. The testimony offered by Minor is the exact same language used as

the incident in question, making the likelihood of inflaming the jurors' passions or encouraging a verdict on an improper basis very minimal. The court did not abuse its discretion because it properly conducted an on-the-record 403 analysis that is supported by the record.[2]

This Court should affirm.

[2] Even if the court erred in admitting the testimony regarding Appellant's other bad act, the error was harmless. An "[e]rror is harmless when it could not reasonably have affected the result of the trial." State v. Reeves, 301 S.C. 191, 193–94, 391 S.E.2d 241, 243 (1990). Here, any error is harmless because the conviction was largely supported by the testimony of Minor. Had minor not testified about the other bad act, she still surely would have testified regarding the incident in question. Because the two incidents are so closely related, and Minor's testimony was the essential evidence for both, the jury likely would have convicted Appellant with or without the testimony regarding the other solicitation.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies this Final Brief of Respondent 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."

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PROOF OF SERVICE

I, Grace Sommer, certify that I have served the within Final Brief of Respondent on Lara M. Caudy, Esquire, counsel of record for the Appellant, by electronic mail to the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served.

This 9th day of April, 2024.

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