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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Fairfield County

Honorable Brian M. Gibbons, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

OSMAN S. SHABAZZ,

APPELLANT

APPELLATE CASE NO. 2022-001387

FINAL 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) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 2

ARGUMENTS

1. **In this murder trial, the trial judge erred in allowing a former sheriff's deputy to testify that, a year before the fatal shooting, Appellant reported that the deceased threatened to expose a video of a sexual encounter between the two that occurred six years earlier when the probative value of the testimony was substantially outweighed by the danger of unfair prejudice.** 3

   Standard of Review 3
   Argument 3
   Rule 403, SCRE 8

2. **The trial judge erred in sentencing Appellant to five years for possession of a weapon during the commission of a violent crime in violation of S.C. Code §16-23-490 when the judge sentenced Appellant to life in prison for murder.** 10

   Standard of Review 10
   Argument 11

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

Ezell v. Ritholz, 188 S.C. 39, 198 S.E. 419 (1938) 12

State ex rel. McLeod v. Holcomb, 245 S.C. 63, 138 S.E.2d 707 (1964) 12

State v. Bonner, 400 S.C. 561, 735 S.E.2d 525 (Ct. App. 2012) 11

State v. Douglas, 369 S.C. 424, 632 S.E.2d 845 (2006) 3

State v. Gilchrist, 329 S.C. 621, 496 S.E.2d 424 (Ct. App. 1998) 10

State v. Gray, 408 S.C. 601, 759 S.E.2d 160 (Ct. App. 2014) 10

State v. Johnston, 333 S.C. 459, 510 S.E.2d 423 (1999) 11

State v. Lyles, 379 S.C. 328, 665 S.E.2d 201 (Ct. App. 2008) 9, 10

State v. Plumer, 439 S.C. 346, 887 S.E.2d 134 (2023) 10, 11, 12

State v. Scott, 405 S.C. 489, 748 S.E.2d 236 (Ct. App. 2013) 9

State v. Smith, 307 S.C. 376, 415 S.E.2d 409 (Ct. App. 1992) 9

State v. Thompson, 420 S.C. 192, 802 S.E.2d 623 (Ct. App. 2017) 10

State v. Vick, 384 S.C. 189, 682 S.E.2d 275 (Ct. App. 2009) 11

Statutes

S.C. Code §16-1-60 11

S.C. Code §16-23-490 1

S.C. Code §16-23-490(A) 11, 12

Rules

Rule 403, SCRE 8, 9

Rule 404(b) SCRE 9

STATEMENT OF ISSUES ON APPEAL

1. In this murder trial, did the trial judge err in allowing a former sheriff's deputy to testify that, a year before the fatal shooting, Appellant reported that the deceased threatened to expose a video of a sexual encounter between the two that occurred six years earlier when the probative value of the testimony was substantially outweighed by the danger of unfair prejudice?

2. Did the trial judge err in sentencing Appellant to five years for possession of a weapon during the commission of a violent crime in violation of S.C. Code §16-23-490 when the judge sentenced Appellant to life in prison for murder?

STATEMENT OF THE CASE

In July of 2021, the Fairfield County Grand Jury indicted Appellant, Osman Shareef Shabazz, Jr., for murder, possession of a weapon during the commission of a violent crime and grand larceny, indictments #2021-GS-20258, 259, 260. On September 26, 2022[1], Appellant proceeded to jury trial before the Honorable Brian M. Gibbons. William Frick and Kay Boulware represented Appellant at trial. Riley Maxwell and Julie Hall prosecuted the case. The jury found Appellant guilty on all three counts. Judge Gibbons sentenced Appellant to life in prison for murder and five years concurrent for both the weapon charge and the larceny charge. A timely notice of intent to appeal was served on September 29, 2022. This appeal follows.

[1] The cover of the trial transcript is dated September 26th through September 30, 2021, but this appears to be a scrivener's error and the correct year is 2022.

ARGUMENTS

1. In this murder trial, the trial judge erred in allowing a former sheriff's deputy to testify that, a year before the fatal shooting, Appellant reported that the deceased threatened to expose a video of a sexual encounter between the two that occurred six years earlier when the probative value of the testimony was substantially outweighed by the danger of unfair prejudice.

Standard of Review

"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, 847–48 (2006). "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. at 429–30, 632 S.E.2d at 848.

Argument

The jury found Appellant guilty of the shooting death of Gabriel Brisbon. Appellant's girlfriend, Sylvia Bacon-Scott, and her brother, Michael Scott, were also charged with the murder of Brisbon. Bacon-Scott testified as a State's witness at Appellant's trial. Her brother, Michael Scott, was called as a witness but asserted his Fifth Amendment privilege against self-incrimination. (R. pp. 512-517).

According to Bacon-Scott, On Sunday, January 31, 2021, Appellant drove her and her brother to his grandmother's house to check on the dogs. (R. pp. 408 – 415). Bacon-Scott testified that after she and Appellant left the house to get dog food and returned to feed the dogs, Appellant told her to hide. (R. p. 417, line 9 – p. 418, lines 1-14). Bacon-Scott claimed that Appellant told her that he did not want the person who was coming to the house to see her. (R. p. 418, lines 15-17). Facebook Messenger texts between Brisbon, the deceased, and Appellant

show that Brisbon contacted Appellant telling him that he had marijuana and the two made plans to meet at Appellant's grandmother's house to smoke Brisbon's marijuana that Sunday. (R. pp. 276-283; State's exhibit #28).

Bacon-Scott testified that a large black man, later determined to be Brisbon, arrived at the house in a light-colored Honda car and met Appellant. (R. p. 420, line 11 – p. 421, lines 1-17). She testified that the two looked like they were getting along, talking and smoking a cigarette. (R. p. 422, lines 6-14). Bacon-Scott did not see her brother at this time. (R. p. 421, lines 6-7). Bacon-Scott left her hiding place to find her brother. (R. p. 423, lines 12-16). She testified that she found her brother in the laundry room with Appellant's black gun in his hand. (R. p. 424, line 8 – p. 425, lines 1-22). Bacon-Scott testified that she went back to where she was because her brother seemed panicked, asking if she had received his texts that Appellant said to stay where she was. (R. p. 425, lines 4-8). Text messages between Bacon-Scott and her brother show that she told him to "go inside." (R. p. 311, line 15 – p. 312, lines 1-13). A few minutes later Bacon-Scott heard gunshots. (R. p. 427, lines 15-18).

Bacon-Scott testified that she came out of her hiding place and saw Appellant and her brother. (R. p. 427, line 23 – p. 428, 429, line 1). Her brother had blood on his face and Appellant's gun in his hand. (R. p. 431, lines 11-25). Bacon-Scott claimed that Appellant told her brother to "Go in and get his phone and keys." (R. p. 428, lines 18-19). She testified that Appellant left in his car and she and her brother drove the Honda home. (R. p. 430, line 13- p. 431, lines 1-3). On the way home her brother told her he shot someone. (R. p. 431, lines 4-7). Bacon-Scott testified that her brother returned the gun to Appellant on February 9, 2021, when they were staying at the Magnuson Motel in Richland County. (R. pp. 470 - 473).

Brisbon's body was found near Appellant's grandmother's house on February 5, 2021. Law enforcement found Brisbon's Honda at the apartment complex where Appellant lived with Bacon-Scott and her brother. (R. pp. 78 – 81). The Honda had been spray painted black with pink trim. (R. p. 80, lines 15-18). Appellant and Bacon-Scott were arrested at the Magnuson Motel on February 11, 2021, and charged with murder. (R. pp. 301-303, lines 1-10). An investigator collected a gun from the motel room. (R. p. 303, lines 11-17). An expert testified, without objection, that the gun found in the motel room and entered in evidence as State's exhibit #1 fired the bullets recovered from autopsy and some recovered at the scene. (R. pp. 378-379). Michael Scott met with a Richland County Investigator on February 11, 2021, and was eventually also charged with murder. (R. pp. 535 – 538).

Prior to trial counsel for Appellant moved to exclude the mention of a video. (R. p. 12, line 25 -p. 13, lines 1-22). On February 2, 2020, a year before the shooting death of Brisbon, Appellant filed a police report about Brisbon threatening to post a video on social media of a sexual encounter between Brisbon and Appellant. Defense counsel argued the reference was too remote and too prejudicial. (R. p. 13, lines 20-22). Defense counsel did not object on hearsay grounds. The State advised that they intended to call the former sheriff's deputy who took the report to testify at trial. (R. p. 13, line 24 – p. 14, lines 1-17). The State admitted that the incident took place in 2015, six years before the shooting. (R. p. 14, lines 10-11). The police report states, "The offender stated that he performed fellatio on the victim and that there's a video recording of it on his phone." (R. p. 14, lines 15-17). The State argued the testimony consisted of Appellant's statements to law enforcement reporting the incident and the probative value was far outweighed by the prejudice it may have. (R. p. 14, lines 18-23).

At this point the judge asked about the defense in the case. (R. p. 14, line 24 – p. 15, lines 1-4). The judge asked, "Is the defense in this case, 'I didn't do it'? Or is the defense in this case, it was an accident? Or is the defense in this case self-defense? Or is the defense in this case that or you could be seeking a possible voluntary - -" (R. p. 14, line 24 – p. 15, lines 1-4). Defense counsel responded, "This is a, 'We didn't do it.'" (R. p. 15, line 8). Defense counsel again noted the remoteness of the report and the incident. (R. p. 15, lines 11-15). The judge denied the defense motion to exclude stating, "I'm going to deny your motion to exclude mention of the video under Rule 403. I do find it is more probative than prejudicial and I will allow the State to introduce that testimony." (R. p. 15, lines 16-19). The trial judge erred. The probative value of the testimony was substantially outweighed by the danger of unfair prejudice, especially in light of the fact that the incident dated back to 2015, six years before the death of Brisbon.

At trial the State called Bryant Goodwin, a former Fairfield County Sheriff's Deputy, who responded to an alarm call on February 5, 2020, at Appellant grandmother's house. (R. pp. 539-540). Goodwin testified that he met with Appellant who had permission to stay at his grandmother's house. (R. p. 541, lines 1-12). Goodwin testified that Appellant reported something that had nothing to do with the alarm. (R. p. 541, lines 13-22). The prosecutor asked, "What was he complaining about?" (R. p. 541, line 23). Counsel for Appellant objected on hearsay grounds. (R. p. 541, line 25). The judge sustained the objection. (R. p. 542, line 1). The prosecutor, however, continued to elicit hearsay responses from the witness without objection from defense counsel[2]. The following questioning took place:

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[2] During pretrial defense counsel advised the judge that the defense was not asserting a self-defense claim or seeking the lesser included offense of voluntary manslaughter. (R. p. 15, lines 1-8).

Q. (By Ms. Hall) What was the nature of the call? I know the nature, it was an alarm call, but what was the nature of the complaint?

A. That he was raped.

Q. Did you develop a suspect in that case?

A. Yes.

Q. In those allegations?

A. Yes.

(R. p. 542, lines 2-9). Defense counsel objected stating, "Objection on grounds previously ruled upon, your Honor." While the judge sustained the earlier hearsay objection, hearsay was not the basis of the objection made to the deputy's testimony pretrial. The judge overruled the objection. (R. p. 542, lines 12-13). The following questioning then took place:

Q. (By Ms. Hall) And who did he say that suspect was to be?

A. Mr. Gabriel.

Q. Gabriel who?

A. Brisbon. I'm sorry if I - -

Q. Gabriel Brisbon?

A. Brisbon. Yes, I apologize.

Q. Were any charges ever filed against Gabriel Brisbon regarding this incident?

A. From my knowledge, I took the report and just passed it onto investigations.

Q. And you've never been called to testify in any kind of case about that or anything?

A. No, never.

Q. Now, I know it was classified as a rape when you classified the nature of it, but was it more about actually a rape itself or was it more about something else?

A. He was - -

(R. p. 542, line 14 – p. 543, lines 1-7). Defense counsel objected and the objection was overruled. (R. p. 543, lines 8-9). The witness then testified, "He was concerned about what took place in a conversation that he was sexually involved with Mr. Gabriel and didn't want the – Mr. Gabriel stated that he was going to basically expose their relationship to Snapchat, the internet and stuff and he didn't want it to get back to the mother of his child." (R. p. 543, lines 11-16). Again, there was no objection based on hearsay.

The trial judge erred in allowing the testimony from the former deputy. The report of a rape and then the clarification as a threat of revenge pornography was highly inflammatory. The probative value of the testimony was substantially outweighed by the danger of unfair prejudice.

Rule 403, SCRE

Rule 403, SCRE, provides that, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Although the trial judge in the present case specifically cited Rule 403, he simply found that the testimony from the former deputy about the prior report that the deceased was threatening to expose a video of a sexual encounter with Appellant was more probative than prejudicial without specifically addressing the probative value or unfair prejudice. (R. p. 15, lines 16-19). During the pretrial hearing to exclude testimony about the prior incident Defense counsel suggested, ". . . as part of the State's theory of the case, that this [threat of exposure] is perhaps a motive for why it occurred." (R. p. 13, lines 13-14). In closing argument the State referenced the prior threat by the deceased to expose the video while discussing motive. (R. p. 598, line 23 – p. 599, lines 1-22).

While the prior threat by the deceased to expose a video of a sexual encounter with Appellant could be probative of motive, in determining if the probative value of the testimony was substantially outweighed by the danger of unfair prejudice pursuant to Rule 403, the judge should have considered the fact that the incident dated back six years before the death and the report was made a year before the death. In State v. Scott, 405 S.C. 489, 748 S.E.2d 236 (Ct. App. 2013), the South Carolina Court of Appeals addressed temporal remoteness as a factor that must be considered in assessing probative value in a Rule 403 analysis pursuant to Rule 404(b). While the present case does not involve a Rule 404(b) prior bad act, the trial judge should have addressed temporal remoteness in assessing the probative value of the prior report of a threat of exposure. The probative value of the report of the prior threat is substantially diminished by the temporal remoteness of both the incident and the report.

The probative value of the former deputy's testimony is further decreased by the fact that the State does not have to prove motive to establish murder because motive is not an element of murder. See State v. Smith, 307 S.C. 376, 385, 415 S.E.2d 409, 414 (Ct. App. 1992). While the State is not required to prove motive, Bacon-Scott testified, without objection, that Appellant told her that the deceased threatened to sexually assault him. (R. p. 407, line 24 – p. 408, lines 1-23). "When juxtaposing the prejudicial effect against the probative value, the determination must be based on the entire record and will turn on the facts of each case." State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 206. The testimony from Bacon-Scott provides motive without reference to the prior threat by the deceased to expose a video of a sexual encounter. The prior deputy's testimony was of minimal probative value based on the entire record in this case.

The deputy's initial testimony that Appellant reported that the deceased raped him was highly prejudicial. The subsequent testimony that the deceased threatened to expose a video of a

sexual encounter with Appellant was also highly prejudicial. In State v. Thompson, 420 S.C. 192, 213, 802 S.E.2d 623, 633–34 (Ct. App. 2017), the South Carolina Court of Appeals wrote:

> "Unfair prejudice means an undue tendency to suggest a decision on an improper basis." State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008) (quoting State v. Gilchrist, 329 S.C. 621, 627, 496 S.E.2d 424, 427 (Ct. App. 1998)). "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence...." State v. Gray, 408 S.C. 601, 616, 759 S.E.2d 160, 168 (Ct. App. 2014) (quoting Gilchrist, 329 S.C. at 630, 496 S.E.2d at 429).

The former deputy's testimony that, a year prior to the shooting, Appellant reported that the deceased raped him and then threatened to expose a video of the sexual encounter, that took place six years prior to the death, had an undue tendency to suggest a decision on an improper basis, a possible motive that the State failed to prove existed at the time of the shooting. The trial judge abused his discretion in admitting the former deputy's testimony when the probative value was substantially outweighed by the danger of unfair prejudice. The error is not harmless.

2. The trial judge erred in sentencing Appellant to five years for possession of a weapon during the commission of a violent crime in violation of S.C. Code §16-23-490 when the judge sentenced Appellant to life in prison for murder.

Standard of Review

"[W]hen a trial court imposes what the State concedes is an illegal sentence, the appellate court may correct that sentence on direct appeal or remand the issue to the trial court even if the defendant did not object to the sentence at trial and even if there is no real threat of incarceration beyond the limits of a legal sentence." State v. Plumer, 439 S.C. 346, 351, 887 S.E.2d 134, 137 (2023).

Argument

The trial judge sentenced Appellant to life in prison for murder and five years concurrent for possession of a weapon during the commission of a violent crime. (R. p. 633). The trial judge imposed an illegal sentence when he sentenced Appellant to life in prison for murder and five years in prison for possession of a weapon during the commission of a violent crime. S.C. Code §16-23-490(A) provides, "If a person is in possession of a firearm or visibly displays what appears to be a firearm ... during the commission of a violent crime and is convicted of committing or attempting to commit a violent crime as defined in Section 16-1-60, he must be imprisoned five years, in addition to the punishment provided for the principal crime. **This five-year sentence does not apply in cases where the death penalty or a life sentence without parole is imposed for the violent crime.**" (emphasis added). S.C. Code §16-1-60 defines murder as a violent crime.

In State v. Plumer, 433 S.C. 300, 308, 857 S.E.2d 796, 800 (Ct. App. 2021), aff'd as modified, 439 S.C. 346, 887 S.E.2d 134 (2023), a case decided before the trial in this case, the South Carolina Court of Appeals, relying on S.C. Code §16-23-490(A), vacated the five-year sentence imposed for possession of a weapon during the commission of a violent crime when the judge also sentenced Plumer to life for attempted murder. In Plumer, as in the present case, there was no objection to the illegal sentence. Citing State v. Johnston, 333 S.C. 459, 510 S.E.2d 423 (1999), State v. Vick, 384 S.C. 189, 682 S.E.2d 275 (Ct. App. 2009). State v. Bonner, 400 S.C. 561, 567, 735 S.E.2d 525, 528 (Ct. App. 2012), all cases decided before the trial in this case, the Court of Appeals found that under the circumstances of the case and as a matter of criminal equity the illegal five-year sentence should be vacated although there was no objection made to the sentence.

The South Carolina Supreme Court affirmed as modified the decision by the Court of Appeals to vacate the illegal sentence writing:

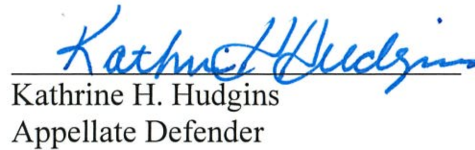
> On occasion, we encounter illegal sentences to which no objection was taken in the trial court. In such cases, it is inefficient and a waste of judicial resources to delay the inevitable by requiring the appellant to file a post-conviction relief action or petition for a writ of habeas corpus. Therefore, we modify Johnston and hold that when a trial court imposes what the State concedes is an illegal sentence, the appellate court may correct that sentence on direct appeal or remand the issue to the trial court even if the defendant did not object to the sentence at trial and even if there is no real threat of incarceration beyond the limits of a legal sentence. However, we do not agree with the court of appeals' conclusion that the correction of the sentence is a function of "criminal equity." Plumer, 433 S.C. at 315, 857 S.E.2d at 803. "The general rule is well settled that equity has no criminal jurisdiction...." State ex rel. McLeod v. Holcomb, 245 S.C. 63, 67, 138 S.E.2d 707, 708 (1964); see Ezell v. Ritholz, 188 S.C. 39, 46-47, 198 S.E. 419, 422 (1938). With that modification, we affirm the court of appeals on this issue.

State v. Plumer, 439 S.C. 346, 351, 887 S.E.2d 134, 137 (2023).

Pursuant to S.C. Code §16-23-490(A), the five-year sentence imposed for possession of a weapon during the commission of a violent crime is an illegal sentence when the judge also sentenced Appellant to life in prison for murder. Although there was no objection made to the illegal sentence, this Court, based on Plumer, should vacate the illegal sentence.

CONCLUSION

Based on the argument presented in issue one, this Court should reverse the convictions and remand for a new trial. Based on the argument presented is issue two, this Court should vacate the illegal five-year sentence for possession of a weapon during the commission of a violent crime.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 9th day of April, 2024.

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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant 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."

This 9th day of April, 2024.

Kathrine Haggard Hudgins
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT