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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Certiorari to Chesterfield County

Honorable Roger E. Henderson, Circuit Court Judge

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MITCHELL RIVERS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-002302

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# REPLY BRIEF OF PETITIONER

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## ARGUMENT IN REPLY

It is well-settled that South Carolina does not recognize the doctrine of *res ipsa loquitur*.[1] Hunter v. Dixie Home Stores, 232 S.C. 139, 144, 101 S.E.2d 262, 265 (1957). Even in civil cases, "there must be some showing of negligence on the part of [a party], and such negligence may be established by circumstantial as well as direct evidence." Gantt v. Columbia Coca-Cola Bottling Co., 193 S.C. 51, 7 S.E.2d 641 (1940). As stated by Justice Carter in a dissent in Delk v. Liggett & Myers Tobacco Co., "the doctrine of *res ipsa loquitur* does not prevail in this state and verdicts cannot rest upon 'guess or conjecture,' and negligence must be proven affirmatively." 180 S.C. 436, 186 S.E. 383, 388 (1936).

It follows that, in criminal cases, it is insufficient to posit that just because an injury occurred, it could be attributed to a criminal defendant. This was the subject of inquiry at the oral argument in Petitioner's direct appeal. Then-counsel for Respondent was asked how the evidence, which was the both subject of Petitioner's direct appeal as well as this action, showed by clear and convincing evidence that Petitioner committed child abuse. Audio of Oral Argument in State v. Mitchell Rivers, Appellate Case No. 2011-186026 dated January 8, 2015 at 18:49 – 21:36. Counsel for Respondent admitted that there was no evidence Petitioner caused the collateral injuries to the child. Id. Additionally, and as noted in this Court's opinion in the direct appeal case, the state admitted that its strongest argument was preservation. Id. Furthermore, counsel for Respondent admitted that the record did not contain proof that Petitioner was the only person with access to the child. Id.

In criminal cases, faced with a higher burden of proof than in civil cases where reliance on *res ipsa loquitur* is generally prohibited, the state must establish by clear and convincing

[1] Latin for "the thing speaks for itself." Black's Law Dictionary (11th ed. 2019)

evidence that the proposed evidence is related to prior alleged bad acts. As correctly stated in Petitioner's brief on direct appeal:

> If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing. Evidence of a prior bad act is not admissible if the State fails to adduce any proof that a defendant was responsible for the act.

App. 428 (internal citations omitted).

At oral argument on direct appeal and in its Brief of Respondent, the state relies on Estelle v. McGuire, 502 U.S. 62, 112 S.Ct. 465, 116 L.Ed.2d 385 (1991) for the notion that evidence which is unattributed to a defendant is still admissible to prove intent. Based on a search by the undersigned, South Carolina state appellate courts have cited to Estelle on eight occasions. One of those instances was in Justice Burnett's dissent in State v. Pierce, 326 S.C. 176, 485 S.E.2d 913 (1997). Pierce was cited by Petitioner on direct appeal and came out approximately six years after Estelle. App. 428.

Pierce is a homicide by child abuse case. Id. at 177, 485 S.E.2d at 913-14. Pierce was convicted of killing her son. Id. at 177, 485 S.E.2d at 914. At Pierce's trial, two hospital employees testified about previous injuries: a "split lip" and a swollen eye. Id. at 178, 485 S.E.2d at 914. The trial court admitted the testimony "because it tended to establish a pattern of child abuse." Id. The South Carolina Supreme Court agreed with Pierce that no clear and convincing evidence was offered to prove that she inflicted the injuries and therefore reversed her conviction. Id. The Court held: "[t]he testimony regarding [the child's] previous injuries is inadmissible absent a conviction or clear and convincing proof that appellant inflicted the injuries." Id. (citing State v. Smith, 300 S.C. 216, 387 S.E.2d 245 (1989)). As in the matter *sub judice*, "[t]he State failed to offer any proof that appellant inflicted these injuries" and therefore the trial court erred in admitting it. Id.

A recent dissenting opinion out of the Sixth Circuit Court of Appeals, authored by Judge Jane Stranch, also criticized blind reliance on Estelle:

> The majority opinion also points to cases like *Lisenba v. People of State of California*, 314 U.S. 219, 62 S.Ct. 280, 86 L.Ed. 166 (1941), and *Estelle v. McGuire*, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991), where the Supreme Court applied this general rule but found no due process violation based on its case-by-case examination of the facts. That some habeas petitioners lose when this general rule is applied to particular facts, however, does not prove that there can never be a due process violation when irrelevant inflammatory evidence is so unduly prejudicial as to affect a trial's fundamental fairness. And that evidence introduced in *Lisenba* and *Estelle* was not sufficiently prejudicial to make those trials fundamentally unfair is proof only of the nature of the rule—it "of necessity requires a case-by-case examination of the evidence." In short, this rule governing evidence must be applied to the particular facts and record of a case, including this one.

Stewart v. Winn, 967 F.3d 534, 542 (6th Cir.), cert. denied sub nom. Stewart v. Stoddard, 141 S. Ct. 929, 208 L. Ed. 2d 472 (2020) (some internal citations omitted)

While it is true that the United States Supreme Court found no due process violation under the United States Constitution or under California law based on its case-by-case examination of the facts in Estelle, that does not preclude a finding of error in this case, where irrelevant inflammatory evidence was so unduly prejudicial as to affect the trial's fundamental fairness. Under the state's theory, perhaps a defendant in California would have been unsuccessful in objecting to this evidence at trial. However, under South Carolina law, particularly our evidentiary rules and accompanying jurisprudence, the state was required to establish, by clear and convincing evidence, proof that Mr. Rivers inflicted the injuries. This requirement has been reinforced in South Carolina case law even after Estelle was published. See Pierce, supra.

Additionally, the prejudicial effect of this evidence substantially outweighed its probative value. Evidence of a defendant's prior crimes or other bad acts to prove the defendant's guilt for

the crime charged is excluded under South Carolina law except to establish (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan, or (5) the identity of the perpetrator. Rule 404(b), SCRE; State v. King, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999). "To be admissible, the bad act must logically relate to the crime with which the defendant has been charged. If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing." State v. Fletcher, 379 S.C. 17, 23, 664 S.E.2d 480, 482 (2008) (citing State v. Pagan, 369 S.C. 301, 631 S.E.2d 262 (2006)). Thus, the record must support a logical relevance between the prior bad act and the crime for which the defendant is accused. Id.; see also State v. Braxton, 342 S.C. 629, 634, 541 S.E.2d 833, 836 (2001). Further, even though the evidence is clear and convincing and falls within a Lyle[2] exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Rule 403, SCRE; Fletcher, 379 S.C. at 23, 664 S.E.2d at 483; King 334 S.C. at 512, 514 S.E.2d at 582; see also State v. Cutro, 332 S.C. 100, 504 S.E.2d 324 (1998).

In the case of the common scheme or plan exception under State v. Lyle, a close degree of similarity between the prior bad act and the crime is necessarily. State v. Parker, 315 S.C. 230, 433 S.E.2d 831 (1993). The connection between the prior bad act and the crime must be more than just a general similarity. State v. Stokes, 279 S.C. 191, 304 S.E.2d 814 (1983).

The state also relies on this Court's opinion in State v. Smith, 391 S.C. 353, 705 S.E.2d 491 (Ct. App. 2011) which it contends was overturned on other grounds by the South Carolina Supreme Court two years later, State v. Smith, 406 S.C. 215, 750 S.E.2d 612 (2013).[3] This

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[2] State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).

[3] The state maintains that this Court's opinion in Smith stands for the notion that "[t]he record need not reflect the exact manner in which a collateral injury occurred." BOR at 13. As will be discussed below, this Court examined additional factors, including overwhelming evidence of

Court's 2011 opinion came out the month before Petitioner's trial and would have offered guidance for trial counsel and served as a tool to prevent admission of the prejudicial evidence. Smith was convicted of aiding and abetting homicide by child abuse against his four-month-old daughter. Id. at 357, 705 S.E.2d at 493. At trial, an objection was lodged regarding evidence of a broken femur the child suffered in November 2003, approximately three months before the child died. Id. at 358, 705 S.E.2d at 494. This Court noted that Smith "had sole custody of [the child] that day." Id. This Court's analysis of the facts in that case can easily be distinguished from Petitioner's case:

> While the record does not reflect the exact manner in which the injury occurred, the State's proof that Smith was guilty of the abuse that caused it is overwhelming. **Smith was the only person with [the child] when the injury occurred.** Smith admitted to [his girlfriend and the child's mother] and to the pediatrician that the injury occurred while he held the child in his hands.

Id. at 362, 705 S.E.2d at 496 (emphasis added). The record in this case did not establish that Mr. Rivers was the exclusive caregiver of the child when the inadmissible injuries occurred.

As it relates to Smith, this topic was also discussed at the oral argument in Mr. Rivers' case on direct appeal. Then-Chief Judge Few inquired of counsel for Respondent whether the record showed that **only Petitioner** had access to the child; counsel answered in the negative. Oral Argument 20:33 – 21:36; see also State v. Palmer, 413 S.C. 410, 776 S.E.2d 558 (2015).

At Petitioner's trial, an investigator named Wayne Jordan testified that between five and seven people lived in the home. App. 196 ll. 16 – 25. Further, Dr. Ross could not put an exact date on the timing of additional bruises that were located on the child. App. 168 ll. 10 – 17. Dr. Nichols was unable to link any of the additional injuries to Petitioner. App. 187 ll. 6 – 10.

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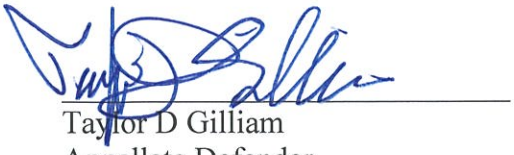
guilt and Smith's status as the sole caretaker of the child on the day the injury occurred, in holding that the evidence was properly admitted.

Trial counsel testified at the post-conviction relief evidentiary hearing that evidence of collateral injuries "substantially hindered" the case. App. 509 ll. 20 – 24. Counsel aptly described how the admission of that evidence altered the case and provided additional evidence the jury could have used to convict Mr. Rivers: "It turn[ed] the case into a case where instead of a one time occurrence of a child dying, it showed a whole pattern of abuse that was allowed to be … submitted before the jury." App. 519 ll. 1 – 9.

Counsel's failure to renew the objection constituted deficient performance, and the state weaponized the otherwise inadmissible evidence during closing arguments. Mr. Rivers was prejudiced by the failure to object.

## CONCLUSION

For these additional reasons, Petitioner respectfully requests that this Court reverse the PCR court's denial of relief and remand for a new trial.



Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 11th day of May, 2021.

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CERTIFICATE OF SERVICE

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Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Reply Brief of Petitioner in the above referenced case has been served upon Chelsey Marto, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and a copy of the Reply Brief of Petitioner has been served on Mitchell Rivers, #344799, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 11th day of May, 2021.

Taylor D Gilliam
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ATTORNEY FOR PETITIONER