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Oct 10 2024

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County

Honorable Jennifer B. McCoy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DESMOND LAMAR GREEN,

APPELLANT

APPELLATE CASE NO. 2024-000119

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in refusing to bifurcate this short trial for the charge of first-degree domestic violence to prevent the unfairly prejudicial effect of the jury learning about appellant's prior convictions for domestic violence?

STATEMENT OF THE CASE

Appellant was indicted in Beaufort for first-degree domestic violence and on January 16, 2024, appellant was tried before the Honorable Jennifer B. McCoy and a jury. Tr. 1. Mary Jordan Lempeis and Sara Malone represented the State. Tr. 1. Juan Tolley represented appellant. Tr. 1. The jury convicted appellant. Tr. 213. Judge McCoy sentenced appellant to ten years' imprisonment suspended upon the service of five years' imprisonment and five years' probation. Tr. 221-222. This appeal follows.

STANDARD OF REVIEW

The standard of review in this case is abuse of discretion and an error of law constitutes an abuse of discretion. State v. Cross, 427 S.C. 465, 473, 832 S.E.2d 281, 285 (2019).

ARGUMENT

The trial court erred in refusing to bifurcate this short trial for the charge of first-degree domestic violence to prevent the unfairly prejudicial effect of the jury learning about appellant's prior convictions for domestic violence.

The trial court held a pre-trial hearing on whether this short domestic violence trial would be bifurcated. Tr. 45. Confusingly, the State initially moved for the trial to not be bifurcated. Tr. 46-47. After a lunch break, Judge McCoy correctly noted that the State “jumped the gun” and that such a motion was the defendant’s to make. Tr. 53-54. Appellant then moved to bifurcate and the court considered the arguments made both before and after the break. Tr. 54.

Appellant argued the trial should be bifurcated based on State v. Cross, 427 S.C. 465, 832 S.E.2d 281 (2019). Tr. 49-51. Hearing that the defendant had been convicted of the same charge for which he was on trial would unfairly prejudice the jury. Tr. 49-51. Defense counsel argued that, unlike cases where courts had upheld decisions not to bifurcate trials where prior convictions were elements, domestic violence was a crime that carried stigmas of a person’s propensity much like the sexual abuse of a child case which should have been bifurcated in Cross. Tr. 51, 54-57.

The State simply argued that bifurcation was not required and pointed to no specific prejudice to the State if it had to present the jury with evidence of appellant’s prior convictions after it decided his guilt on the charge. Tr. 49-52. The trial judge declined to bifurcate the case. Tr. 63-65. Judge McCoy reasoned that Cross was limited to sexual offenses involving children. Tr. 63-65. The judge then commented that a “less prejudicial way” to introduce evidence of appellant’s priors was through a stipulation. Tr. 65. While defense counsel initially indicated she

would not accept a stipulation, a stipulation was ultimately agreed upon and read to the jury. Tr. 155-56; Tr. 166.

The State immediately made appellant's reasons for wanting to bifurcate the trial a reality in its opening statement. Tr. 97. The solicitor knew the alleged victim would be uncooperative and told the jury "she doesn't particularly want to be here." Tr. 97. "She doesn't want to be testifying against the father of her five children. **However, this has to stop.**" Tr. 97 (emphasis added). Defense counsel objected that the solicitor had implied appellant had beaten the complainant many times. Tr. 97-98. Judge McCoy told the solicitor she was "tiptoeing on that whole golden rule" and that she should continue. Tr. 98.

The complainant's sister testified that she really did not remember the incident, but acknowledged giving a statement that she saw her sister in the yard with gasoline on her and that appellant punched her in the head. Tr. 107-110. She also acknowledged that her statement said both complainant and appellant were throwing things. Tr. 113. The complainant said she did not remember speaking with a police officer on the day of the incident. Tr. 122. When confronted with her statement, she denied remembering making it. Tr. 125-26. On cross-examination, the complainant agreed that she told the State she did not want appellant prosecuted and that she required no medical treatment that day. Tr. 128. The responding police officer acknowledged on cross-examination that appellant had not poured gasoline on the complainant but had thrown a bottle of lighter fluid at her. Tr. 143-44.

At the end of the State's case, the solicitor read the following stipulation to the jury:

The defense and the State have stipulated for the admission of the defendant's prior convictions of domestic violence. The defendant, Desmond Green, was convicted on June 19, 2014, of criminal domestic violence in *State v. Desmond Green*, indictment number 2013-GS-07-01208, the defendant, Desmond Green, was convicted on March 25th of 2015 of criminal domestic violence in *State v. Desmond Green*, indictment number 2014-GS-07-02009.

This stipulation means that both parties have agreed that these prior convictions will be items of evidence and will be made available to you, the jury, during deliberations.

Tr. 166. During her charge on the elements of domestic violence, Judge McCoy told the jury they could only use the evidence of prior crimes “on the sole issue of prior convictions” and could not consider “the commission of another offense as proof of the defendant’s guilt of the current charge we are trying today.” Tr. 200. During deliberations, the jury asked to re-hear the 911 call, to see witness statements (that were not entered into evidence), and also asked to be re-charged on the “definitions of first-degree domestic violence.” Tr. 203-11.

The trial judge erred in refusing to bifurcate this trial because the danger of unfair prejudice that the jury would view appellant as a serial domestic abuser could not be cured by the court’s limiting instruction. The State would have suffered no prejudice from bifurcation of this brief trial and articulated none during the pre-trial hearing. The only detriment to the State would have been elimination of its unfair ability to capitalize on the jury hearing that appellant had two prior convictions for domestic violence to bolster its weak case. The trial judge acknowledged that some prejudice would exist when she told the defense that a stipulation would be “the least prejudicial way to do it.” Tr. 66. The solicitor immediately tried to use the priors as propensity evidence in her opening statement when she told the jury, “this has to stop.” Tr. 97.

Defense counsel correctly relied upon Rule 403, SCRE, and the Cross Court’s analysis of a trial judge’s duty to balance Rule 403 and when evidence of prior crimes is admitted. Tr. 54-57. Cross at 479, 832 S.E.2d at 288-89 (“Necessarily, therefore, the question of when evidence of the prior conviction comes sharply into focus.”). “In this case, the integrity of Rule 403 and the obligation of the State to introduce necessary evidence are both salvaged by the application

of Rule 611(a), SCRE [giving trial courts control over the mode and order of admission of evidence.” Cross at 479, 832 S.E.2d 288-89.

Cross involved a crime enhanced to first-degree criminal sexual conduct (CSC) by the fact of a prior conviction for CSC. The Court noted that it had upheld refusals to bifurcate in burglary trials with similar enhancements based on prior convictions. Id. at 478, 832 S.E.2d at 288. “Nevertheless we distinguish this case from the first-degree burglary cases because of the inherently prejudicial stigma a prior sex-related offense undoubtedly carries.” Id. Bifurcation was required in Cross to guard against a Rule 403 violation because of that stigma.

Domestic violence also carries a great stigma. While the stigma may not be as great as molesting children, it is certainly greater than burglary. The Cross Court recognized that even too many burglary convictions introduced as evidence can overwhelm Rule 403. Id. at 477, 832 S.E.2d at 287 (citing State v. James, 355 S.C. 25, 583 S.E.2d 745 (2003)). Any hearing of a prior domestic violence conviction invokes unfair prejudice and here the jury heard about two prior domestic violence convictions.

Vermont requires courts to consider bifurcating domestic violence trials with enhancements for prior convictions. State v. Brillon, 995 A.2d 557, 561-70 (Vt. 2010). Brillon dealt with a prosecution for aggravated domestic assault. Id. The aggravating factor was the defendant’s breach of a condition-of-release order. Id. The court found that bifurcation was necessary because of the unfair prejudice of the jury hearing propensity evidence. Id. The court also found that the issue of an enhancement or element and the nature of the prior bad act used in Brillon did not matter. Id. The court noted that if the State instead used a prior conviction for domestic violence, bifurcation would have been mandatory. Id. at 460-61 (“The State agrees that if defendant had a prior conviction for domestic assault and had been consequently charged with

domestic assault under 13 V.S.A. § 1044(a)(2), then he would have been entitled to a bifurcated trial.”).

This Court recently rejected a claim that Cross bifurcation was required in a murder trial that also contained a charge for felony possession of a firearm. State v. Gleaton, ___ S.C. ___, ___ S.E.2d ___, Op. No. 6086 (S.C. Ct. App. Aug. 28, 2024). But unlike in Gleaton, domestic violence carries a much greater stigma than possession of a firearm. Especially in South Carolina, very little stigma (if any) attaches to the possession of a gun. But having a jury perceive a defendant as a serial wife-beater creates a great risk of unfair prejudice.

The trial court here erred in narrowly interpreting Cross. Bifurcation would have taken thirty minutes in a trial that barely spanned two days. The State would have suffered no prejudice. The State’s case was weak as the alleged victim did not cooperate. The jury’s deliberations show they struggled with the facts as well as the definition of first-degree domestic violence. This Court should reverse and grant appellant a new trial free from the taint of this propensity evidence.

CONCLUSION

For the foregoing reasons, appellant's conviction should be reversed and this case remanded for a new trial.



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ATTORNEY FOR APPELLANT

This 10th day of October, 2024.