

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County

J. C. Buddy Nicholson, Jr., Circuit Court Judge

RECEIVED
OCT 18 2013

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

BENJAMIN J. JACKSON,

APPELLANT

APPELLATE CASE NO. 2012-210107

FINAL BRIEF OF APPELLANT

LANELLE CANTEY DURANT
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TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES 2

STATEMENT OF ISSUE ON APPEAL 3

STATEMENT OF THE CASE 4

ARGUMENT 5

CONCLUSION 10

TABLE OF AUTHORITIES

Cases

State v. McConnell, 290 S.C. 278, 350 S.E.2d 179 (1986)..... 8

State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006)..... 8

State v. Salley, 398 S.C. 160, 727 S.E.2d 740 (2012)..... 8

Rules

Rule 401, SCRE..... 8

Rule 403, SCRE..... 8

STATEMENT OF ISSUE ON APPEAL

Did the trial court err in admitting testimony of the gun shells found in Appellant's home when a gun was never recovered, and the make and caliber of gun never discovered which made the shells irrelevant but prejudicial?

STATEMENT OF THE CASE

On October 20, 2010, the Berkeley County Grand Jury indicted Benjamin J. Jackson, III, on the charges of possession of a firearm during a crime of violence, burglary second degree, grand larceny, kidnapping, armed robbery (AR), failure to stop for a blue light (FTSBL). On March 8, 2012, Jackson proceeded to trial before the Honorable J.C. Buddy Nicholson and a jury. Jackson was represented by Patricia A. Kennedy, and the state was represented by Brian Alfaro and Ariel Pittman. R. 1.

The jury returned verdicts of guilty on all charges as indicted. Judge Nicholson sentenced Jackson to thirty years on the kidnapping; thirty years on the AR; five years on the possession of a weapon during a crime of violence; three years on the FTSBL; fifteen years on the burglary second degree; and ten years on the grand larceny suspended to five years probation. All sentences were to run concurrently except the probation. R. 125, ll. 22 – R. 127, ll. 6. Jackson's attorney filed a notice of appeal. This appeal follows.

ARGUMENT

The trial court erred in admitting testimony of the gun shells found in Appellant's home when a gun was never recovered, and the make and caliber of gun never discovered which made the shells irrelevant but prejudicial.

One of Hazel Dunning's regular cleaning jobs was to clean St. Stephen Evangelical Church every week. On May 19, 2010 she was cleaning the church. R. 26, ll. 14 – R. 28, ll. 25. At that time, construction work was being done at the church, so several construction workers were there also. R. 29, ll. 9 – 25. Her Eddie Bauer Expedition vehicle was parked at the back. R. 31, ll. 1 – 25.

As she was cleaning the kitchen area, someone approached her from behind and asked for her keys. When she turned, she was facing the barrel of a gun in her face. The person said he wanted her "f'ing keys or I'll blow your head off." R. 33, ll. 8 – 25. She knew the voice and said it was not anyone at the church. It was a long barrel gun, but the barrel was small. She handed the person her keys and cell phone as she feared for her life. The he made her lay down on the floor. R. 34, ll. 1 – R. 35, ll. 5.

The only description she could give was that the man wore a white T-shirt, dark pants, and maybe a cap. She did not want to look him directly in the face due to the gun being in her face. R. 35, ll. 6 – 24.

Her son, who was upstairs during the incident, heard her car spin off. One of the workers called the police who arrived shortly. R. 36, ll. 1 – 24. Her car was returned to her about two weeks later but had been wrecked, and her personal items were missing from the car. R. 36, ll. 25 – R. 38, ll. 4.

On May 28, 2010, Investigator Rick Ollic of the Berkeley County Sheriff's Department, was involved in the initial investigation of the incident at St. Stephens Church. He knew that a white Ford Expedition had been stolen. They were not able to locate the vehicle at the time of the incident. R. 39, ll. 16 – R. 42, ll. 23.

On May 28, 2010, around midnight, he saw a vehicle fitting that description at the red light in Moncks Corner. He followed the car and called for back up. R. 43, ll. 2 – R. 45, ll. 25. Investigator Ollic initiated his blue lights and the vehicle initially stopped. R. 46, ll. 1 – 25. As he approached the vehicle, it sped off. The officers chased the vehicle which eventually wrecked. The driver ran into the woods and was not apprehended then. However, a wallet with credit cards and identifying information was found in the vehicle. The vehicle was determined to belong to Ms. Dunning by the Vin number. R. 47, ll. 22 – R. 48, ll.24; R. 49, ll. 1 – R. 52, ll. 13.

The name on the cards and ID was Benjamin Jackson with an address. The officers obtained a search warrant and went to Jackson's address. Various items belonging to Ms. Dunning were found. R. 52, ll. 14 – R. 54, ll. 20.

Detective Michael Cortte of the Berkeley county Sheriff 's Department was the lead detective on the case so he was present at the execution of the search warrant at Jackson's home. R. 55, ll. 16 – R. 56, ll. 25. No firearms were located. Ammunition was located that would "be consistent with the description of the weapon by the victim." Three .410 shotgun shells were found in Jackson's pocket, nine were found in a Crown Royal bag in the master bedroom, and a box of .410 shells were found in the bedroom. Jackson was taken into custody. R. 57, ll. 1 – R. 58, ll. 4.

Investigator Cortte met with Jackson who gave an oral statement on June 2, 2010 admitting that he did it and he was sorry. R. 58, ll. 8 – R. 63, ll. 20; R. 64, ll. 1 – 5. The following day, Investigator Cortte met with Jackson at the detention center where Jackson gave a written statement apologizing to the victim and declaring he was just after the vehicle. R. 64, ll. 6 – R. 68, ll. 25.

Officer Harold Wadford with the St Stephens Police Department responded to the scene. R. 19, ll. 15 – R. 20, ll. 25. He reported that no weapon was located. R. 23, ll. 1 – 10.

In a pretrial motion, defense counsel moved for the shells that were found at Jackson's home and the two photographs of the shells not be admitted because they were not relevant. The state explained that no weapon was recovered but the victim identified the gun as a long gun or a rifle or a shotgun but she was not able to say which. The state argued that the shells would be consistent with that type of weapon. Defense counsel argued that the shells would be more prejudicial than probative. The judge said he would make the decision after he heard some of the testimony. R. 9, ll. 5 – R. 12, ll. 23.

During the testimony of Detective Cortte, the state asked to approach the bench whereupon a bench conference was held. Suppl. R. 99, ll. 15 – R. 57, ll. 2. Detective Cortte then testified that the .410 shells were found in Jackson's home. There was no objection by defense counsel. R. 57, ll. 4 – R. 58, ll. 4. On cross examination, Detective Cortte admitted that no weapon was found in this case. He also admitted that the shells that were found could be consistent with any rifle or long barrel gun. R. 69, ll. 12 – 25.

Immediately after this, the judge put some information on the record that was discussed at the bench. He said:

The Court: Ms. Kennedy had an objection to the pictures and the shells themselves, which I sustained. I said I would allow you (the

solicitor)to ask did they find any weapons or find any ammunition and what ammunition they found. I allowed those questions.

Mr. Alfarao: Yes, sir.

The Court: Over her objection. Okay. Anything else we need to put on the record?

R. 70, ll. 10 – R. 71, ll. 13.

Consequently, from the judge's comment about what needed to be put on the record from the bench conference, it is clear that the judge believed defense counsel objected during the bench conference to the testimony of the gun shells coming in.

The admission of evidence is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (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.

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.

Evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy. State v. Salley, 398 S.C. 160, 727 S.E.2d 740 (2012), citing Rule 401, SCRE.

In State v. McConnell, 290 S.C. 278, 350 S.E.2d 179 (1986), the Supreme Court ruled that .22 caliber bullets recovered from defendant's apartment, a .22 caliber pistol, .25 caliber bullets, and a photograph showing a hole in the window near the front door should not have been admitted because they were not properly connected with the incident, were

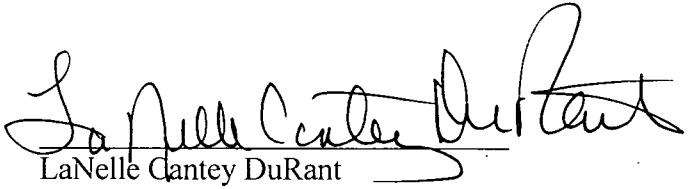
irrelevant, incompetent, and raised inferences of prior bad acts. The Court wrote that there was insufficient connection between the evidence and the crime, and the cumulative prejudicial effect of the enumerated evidence far outweighed its probative value.

The trial court erred in admitting the testimony of the gun shells because they were not relevant as they were not shown to match the weapon used in the crime. The weapon was not recovered so there was no evidence as to the kind of gun it was other than it had a long barrel. The shells were prejudicial because it was highly probable that the shells led the jury to believe that Jackson owned a gun which could have been used during the crime.

CONCLUSION

Based on the above, the convictions and sentences should be reversed, and the case remanded for a new trial.

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender

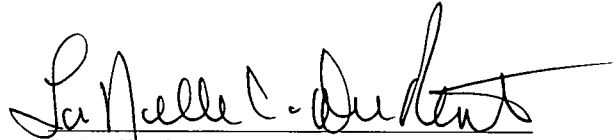
ATTORNEY FOR APPELLANT

This 18th day of October, 2013.

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 August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

October 18th, 2013



LaNelle C. DuRant
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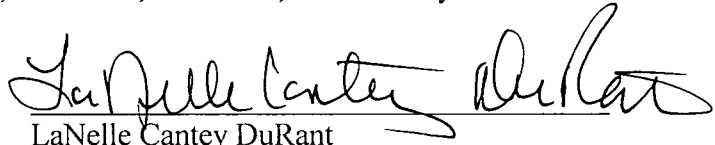
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CERTIFICATE OF SERVICE

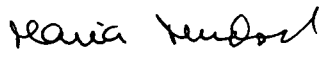
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Julie Kate Keeney, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 18th day of October 2013.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 18th day of October, 2013.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.