STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable Robin B. Stilwell, Circuit Court Judge
Appellate Case No. 2011-202347

THE STATE,

Respondent,

vs.

WILLIAM A. BUTTS,

Appellant.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF THE CASE

In July 2011, a Greenville County Grand Jury indicted Appellant for three counts of armed robbery and three counts of possession of a weapon during the commission of a violent crime.

On October 17, 2011, Appellant proceeded to trial. A jury found Appellant guilty on all charges. The Honorable Robin B. Stilwell sentenced Appellant to twenty years each for the armed robbery convictions and five years each for the possession of a weapon during the commission of a violent crime convictions, which were all to run concurrently.

STATEMENT OF FACTS

Appellant robbed the same Citgo gas station on Woodruff Road in Greenville three times in 2009.

On October 18, 2009, a few minutes before the first robbery, Appellant's ex-girlfriend, Sarah McCroskey, dropped Appellant off at the Rite Aid parking lot, which was near the Citgo gas station. (R. p. 188.) Appellant was wearing a t-shirt and black sweatpants. (R. p. 189.) McCroskey testified that Appellant had some other stuff in his hand "like a hoodie or something[.]" (R. p. 189.) Appellant carried his gun in the waist of his pants. (R. p. 193.)

On October 18, 2009, Appellant robbed the gas station for the first time. (R. p. 94; R. p. 95; R. p. 98.) William Flynn, a Citgo employee, was working on the night of the October 18th robbery. He testified that the robber wore a homemade mask, a white hoodie, black pants, tennis shoes, and gloves. (R. p. 115.) Furthermore, Flynn testified the robber carried a black gun with a silver stripe. Flynn stated that State's Exhibit 14[1], which was the mask the police recovered from a van that Appellant would drive on occasion, was similar to the mask the robber wore on the night of the October 18th robbery. (R. pp. 116-117; R. p. 194.) Moreover, Flynn testified that State's Exhibit 12, which was Appellant's gun, was similar to the gun the robber used on the October 18th robbery. (R. p. 118.)

On October 30, 2009, Appellant robbed the gas station for the second time. (R. pp. 130-131.) Victor Campbell, a Citgo employee, testified that the robber was a black

[1] McCroskey found a homemade mask underneath her mattress sometime after the robberies; however, she threw the mattress away. (R. pp. 194-195.) Around August 2011, McCroskey's grandmother found a mask with eye slots cut of it in her van underneath one of the seats. She gave the mask to the investigations, which is State's Exhibit 14. (R. pp. 231-234.)

male, who wore a mask, hoodie, and gloves. Furthermore, Campbell testified that the mask found at Appellant's girlfriend's house was similar to the mask the robber wore during the October 30th robbery. (R. pp. 132-133.) In addition to stealing money, Appellant stole cigars from the gas station. (R. p. 132.)

On November 5, 2009, Appellant robbed the gas station for the third time. (R. p. 120; R. p. 126.) Flynn, the same employee working during the October 18th robbery, was working during the November 5th robbery. The robber wore a mask, blue jeans, a black shirt over his hoodie, and gloves. (R. p. 123). Moreover, the gun looked like the same gun the robber used in the first robbery. (R. pp. 123-124.) Flynn believed the robber was the same person that robbed him on October 18th. (R. pp. 124-125.)

At trial, the State introduced videos of each robbery. McCroskey testified that the robber in each video had a similar voice, mannerisms, and clothing as Appellant. (R. pp. 196-201.) In November 2009, Appellant called McCroskey and asked her to take his gun that was under McCroskey's mattress and give it to his cousin. (R. pp. 201-202.) Furthermore, McCroskey's grandmother, Mary Katherine Spaulding, testified that Appellant had a similar, voice, mannerisms, and clothing as the robber in each of the videos. (R. pp. 246-248.)

During Appellant's cross-examination of David Weiner, a sergeant at the Greenville County Sherriff's Office, Appellant asked Weiner if the gun belonging to Appellant was connected to the robberies. (R. p. 301.) In response, Weiner stated that he believed the gun used in the robberies was the same gun as Appellant's gun because it had distinguishing characteristics. (R. p. 301.) In particular, Appellant's gun was made by

a company named Hi-Point and was black with a gray stripe down the side, just like the gun used in the robberies. (R. p. 301.)

ARGUMENT

I.

The trial judge did not abuse his discretion in denying Appellant's motion to sever because Appellant's charges were of the same general nature involving connected transactions closely related in kind, place, and character, and the consolidation of the charges did not result in prejudice to Appellant's substantive rights, especially where evidence regarding the other robberies would have been admissible in separate trials in any event under Rule 404(b), SCRE.

A. The trial judge had broad discretion in deciding whether or not to grant Appellant's motion to sever.

A defendant has "no inalienable right" to be tried separately for each indicted offense when charged with multiple crimes. McCrary v. State, 249 S.C. 14, 38, 152 S.E.2d 235, 247 (1967). A motion for severance or consolidation is addressed to the sound discretion of the trial court. State v. Tucker, 324 S.C. 155, 164, 478 S.E.2d 260, 265 (1996). The trial judge's ruling on such a motion will not be disturbed on appeal absent an abuse of discretion. State v. Simmons, 352 S.C. 342, 350, 573 S.E.2d 856, 860 (Ct. App. 2002). An abuse of discretion occurs when the trial judge's decision is unsupported by the evidence or controlled by an error of law. State v. Rice, 368 S.C. 610, 613, 629 S.E.2d 393, 395 (Ct. App. 2006). The exercise of the trial court's discretion must be based upon just and proper consideration of the particular circumstances presented in each case. State v. Castineira, 341 S.C. 619, 624, 535 S.E.2d 449, 452 (Ct. App. 2000).

B. The trial judge did not err in consolidating the charges because the charges were connected transactions closely related in kind, place, and character.

When separately-indicted offenses are of the same general nature involving connected transactions closely related in kind, place, and character, the trial judge has the discretion to order that the indictments be tried together so long as the defendant's substantive rights are not prejudiced. State v. Cutro, 365 S.C. 366, 374, 618 S.E.2d 890, 894 (2005); State v. Carter, 324 S.C. 383, 386, 478 S.E.2d 86, 88 (Ct. App. 1996) ("Joinder is proper if the offenses (1) are of the same general nature or character and spring from the same series of transactions, (2) are committed by the same offender, and (3) require the same or similar proof." (citing City of Greenville v. Chapman, 210 S.C. 157, 41 S.E.2d 865 (1947))); see also Tucker, 324 S.C. at 164, 478 S.E.2d at 265 ("Charges can be joined in the same indictment and tried together where they (1) arise out of a single chain of circumstances, (2) are proved by the same evidence, (3) are of the same general nature, and (4) no real right of the defendant has been prejudiced."). "When offenses are interconnected they are considered to be of the same general nature." State v. Grace, 350 S.C. 19, 23, 564 S.E.2d 331, 333 (Ct. App. 2002); see also State v. Jones, 325 S.C. 310, 315, 479 S.E.2d 517, 519 (Ct. App. 1996). Conversely, offenses which are of the same nature, but which do not arise out of a single chain of circumstances and are not provable by the same evidence may not properly be tried together. Simmons, 352 S.C. at 350, 573 S.E.2d at 860.

1. The charges arose out of a single chain of circumstances.

Appellant contends that the charges against Appellant did not arise out of a single chain of circumstances. However, the trial judge properly denied Appellant's severance motion because the charges for which Appellant was indicted were connected transactions closely related in kind, place, and character.

In Grace, 350 S.C. at 22, 564 S.E.2d at 332, the defendant was separately indicted for three counts of criminal sexual conduct with a minor and one count of lewd act on a minor after his wife discovered him naked in a bed with his niece, who later revealed prior similar events. The four indictments alleged different sexual acts performed over a three month span between August and October of the same year. Id. at 23, 564 S.E.2d at 333. Grace was indicted for sexual battery by fellatio occurring between August and September, sexual battery by intercourse occurring between August and October, sexual battery by digital penetration occurring between August and September, and lewd act occurring in October. The Court of Appeals found the trial judge did not abuse his discretion by consolidating the charges because the charges were all of the same general nature and occurred in the same place "within a relatively short time period." Id. at 24, 564 S.E.2d at 333.

In State v. Cutro, Cutro was convicted of two counts of homicide by child abuse after two infants died and another was injured in her home daycare. Id., 365 S.C. at 369, 618 S.E.2d at 891. The first child died while under Cutro's care in January of 1993. Id. at 370, 618 S.E.2d at 892. The second child was severely injured while under Cutro's care in June of 1993. Id. at 371-372, 618 S.E.2d at 893. The third child died while under Cutro's care in September of 1993. Id. at 372, 618 S.E.2d at 893. The Supreme Court

affirmed Cutro's conviction, finding the cases were properly consolidated for trial. Id. at 375, 618 S.E.2d at 895. The Supreme Court held: "[A]ll three offenses are similar in kind, place, and character – each involves Shaken Baby Syndrome inflicted on an infant in the Cutros' daycare. There offenses clearly fit within the Lyle categories for common scheme or plan and motive. We conclude the charges were properly tried jointly." Id.

In the present case, the trial judge properly denied Appellant's severance motion. The charges for which Appellant was indicted were connected transactions closely related in kind, place, and character. These connected transactions arose out of a chain of circumstances similar to the situations in both Cutro and Grace. Each of Appellant's crimes occurred over a short span of time (eighteen days) between October and November of 2009. Additionally, the charges were extremely similar in nature. In each of the charged offenses, Appellant robbed the same gas station. Moreover, Appellant's ex-girlfriend testified that the assailant in each video had the same voice and mannerisms as Appellant. In addition, in each of the charged offenses, Appellant used what appeared to be the same gun. Thus, all of the charged offenses were closely related in kind, place, and character.

2. The three armed robberies were proven by the same evidence.

Furthermore, each charged offense was established by the same evidence. The majority of the State's witnesses would need to testify in each trial if the trial judge severed the charges. For example, Appellant's girlfriend testified that the robber in three armed robbery videos had the same mannerisms and voice as Appellant. Thus, she would have had to testify in all three trials. Exactly as noted in State v. Harry, even if Appellant's severance motion had been granted, essentially the same evidence, including

each victim's testimony and the videos of the robbery, would have been admitted under Lyle and Rule 404(b), SCRE, at each trial. State v. Harry, 321 S.C. 273, 279, n. 2, 468 S.E.2d 76, 80 (Ct. App. 1996). Furthermore, the two investigators would have had to testify in all three trials because they worked on all three cases.

Moreover, in State v. Caldwell, this Court stated:

> While the alleged crimes involved pertained to three separate children necessitating some individual evidence as to each of the charges, much of the evidence produce at trial pertained to each of the separate charges. Thus, the separate offenses are proved by the same evidence. We find the fact that some additional evidence from the individual victims may be necessary to prove the individual crimes is not fatal to the joinder of the charges.

State v. Caldwell, 378 S.C. 268, 278, 662 S.E.2d 474, 479-480 (Ct. App. 2008).

Thus, even though the three armed robberies would have required some individual evidence, consolidation was still proper because much of the evidence produced at trial pertained to each of the separate charges.

3. **Appellant conceded that the armed robberies were of the same general nature.**[2]

4. **Appellant's right to a fair trial was not jeopardized by the consolidation of the cases.**

Furthermore, there has been no showing of prejudice resulting from the trial judge's decision" to consolidate the charges. Jones, 325 S.C. at 315, 479 S.E.2d at 520. Indeed, the trial judge ensured Appellant would not be prejudiced as a result of joinder of the charges by instructing the jurors that each charge had to be considered separately and

[2] "However, an analysis of the facts presented at trial indicates that joinder of the three robberies in one trial fails to meet at least **three of the four requirements** for joinder and placed Mr. Butts in a situation that was unfairly prejudicial." (emphasis added) (App. Br. p. 14.)

independently without reference to the other charge. (See R. p. 348.) By expressly instructing the jury to consider the charges separately, the trial judge eliminated any prejudice that could have resulted from consolidation of the charges. See State v. Anderson, 318 S.C. 395, 400, 458 S.E.2d 56, 59 (Ct. App. 1995) ("[T]he trial court did not abuse its discretion in denying Anderson's severance motion and Anderson was not prejudiced by the admission into evidence of prior convictions because the trial court gave a sufficient limiting instruction to the jury."); Harry, 321 S.C. at 279, 468 S.E.2d at, 80 (finding no abuse of discretion in the trial judge's determination the charges should have been jointly tried where "[t]he trial judge went to great lengths to fully instruct the jury that the state had the burden of proving each element of each crime"); see also Foye v. State, 335 S.C. 586, 590, n.1, 518 S.E.2d 265, 267 (1999) ("A jury is presumed to follow instructions."); State v. Queen, 264 S.C. 515, 521, 216 S.E.2d 182, 185 (1975) ("It is the duty of jurors to take the law from the court in the particular case on trial. It must be presumed that they do so."); State v. Grovenstein, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) ("[J]urors are presumed to follow the law as instructed to them.").

In addition, Appellant's substantive rights were not prejudiced by joinder of the charges because the evidence regarding the other robberies of the same gas station would have been admissible in each separate trial had the charges not been consolidated. See, e.g., Cutro, 365 S.C. at 375, 618 S.E.2d at 895 ("Here, according to the State's case, all three offenses are similar in kind, place, and character—each involves Shaken Baby Syndrome inflicted on an infant in the Cutros' daycare. These offenses clearly fit within the Lyle categories for common scheme or plan and motive. We conclude the charges were properly tried jointly."); Rice, 368 S.C. at 615-16, 629 S.E.2d at 396 (defendant was

not prejudiced by joinder of his charges where evidence regarding the other crime would have been admissible in any event in separate trials to show motive).

Under Rule 404(b), SCRE, evidence of prior bad acts may be admissible "to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." See State v. Lyle, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923). In determining whether to admit evidence of prior bad acts, the trial judge must first determine if the evidence is relevant. State v. Wallace, 384 S.C. 428, 433, 683 S.E.2d 275, 277 (2009). If a piece of evidence could assist the jury in arriving at the truth of an issue, it is relevant and should be admitted during trial. State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986).

After determining that the prior bad act evidence is relevant, the trial judge must next determine if the prior bad act evidence falls within one of the permissible exceptions of Rule 404(b), SCRE. Wallace, 384 S.C. at 433, 683 S.E.2d at 277. One such exception is the common scheme or plan exception, which necessitates a close degree of similarity or connection between the prior bad act and the charged offense. State v. Cutro, 332 S.C. 100, 103, 504 S.E.2d 324, 325 (1998). Regarding the common scheme or plan exception, the Supreme Court has instructed:

> Such evidence is relevant because proof of one is strong proof of the other. When determining whether evidence is admissible as common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity. Where the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b). Although not a complete list, in this type of case, the trial court should consider the following factors when determining whether there is a close degree of similarity between the bad act and the crime charge: (1) the age of the victims when the abuse occurred; (2) the relationship

> between the victims and the perpetrator; (3) the location where the abuse occurred; (4) the use of coercion or threats; and (5) the manner of the occurrence, for example, the type of sexual battery. We emphasize that these factors are set out merely for guidance and that other factors may be relevant in weighing the similarities and the dissimilarities between the crime charged and the bad act evidence.

Wallace, 384 S.C. at 433-434, 683 S.E.2d at 277-278 (citations omitted). Thus, the required connection between prior bad acts and a charged offense is established by a close degree of similarity in those acts, and no further connection is required for admissibility. Id. at 434, 683 S.E.2d at 278. "Requiring a 'connection' between the crime charged and the bad act evidence is simply a requirement that the two be factually similar and does not add an additional layer of analysis." Id. at 434, n. 5, 683 S.E.2d at 278.

Finally, after determining the prior bad act evidence is relevant and falls within a permissible exception of Rule 404(b), SCRE, the trial judge must weigh the probative value of the evidence against its prejudicial effect. State v. Mathis, 359 S.C. 450, 463, 597 S.E.2d 872, 879 (Ct. App. 2004). "The probative value of evidence falling within one of the Rule 404(b) exceptions must substantially outweigh the danger of unfair prejudice to the defendant." Wallace, 384 S.C. at 435, 683 S.E.2d at 278. The determination of the prejudicial effect of prior bad act evidence must be based on the entire record and the result generally hinges on the facts of each specific case. State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007). "Where the evidence of the bad acts is so similar to the charged offense that the previous act enhances the probative value of the evidence so as to outweigh its prejudicial effect, it is admissible." Mathis, 359 S.C. at 463, 597 S.E.2d at 879.

In Appellant's case, the evidence regarding the other robberies of the same gas station would have been admissible in separate trials under the common scheme or plan exceptions to Rule 404, SCRE because there was a close degree of similarity between the robberies and the similarities between the incidents outweighed the dissimilarities. Wallace, 384 S.C. at 433, 683 S.E.2d at 278. The robberies occurred at the same gas station within a relatively short period of time. The assailant in all three armed robberies had the same physical characteristics and similar clothing. Furthermore, Appellant's ex-girlfriend and her grandmother testified that the assailant in all three armed robberies had the same mannerisms and voice as Appellant. Moreover, the assailant in all three videos seemed to be carrying the same gun. Thus, there is a clearly perceived connection between each of the crimes, and there is an obvious degree of similarity. Moreover, Rule 403, SCRE, does not preclude admission this evidence.

In conclusion, the trial judge did not abuse his discretion by consolidating Appellant's charges because the charges were of the same general nature involving connected transactions closely related in kind, place, and character, and the consolidation of the charges did not result in any prejudice to Appellant's substantive rights. The trial judge's denial of Appellant's motion to sever should be affirmed.

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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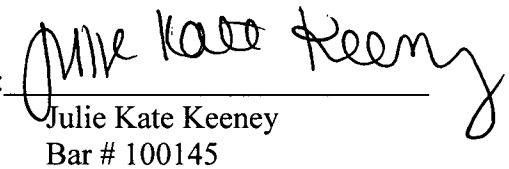
BY: 
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March 22, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable Robin B. Stilwell, Circuit Court Judge

THE STATE,

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vs.

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Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent 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."

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March 22, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
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THE STATE,

Respondent,

vs.

WILLIAM A. BUTTS,

Appellant.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served. This 22nd day of March, 2013.

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