THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LAURENS COUNTY
Court of General Sessions

Frank R. Addy, Circuit Court Judge

Case No. 12-GS-30-1154
Appellate Case No.: 2013-000579

State of South Carolina .....Respondent,

v.

Richard Sylvester Evans .....Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES

I. Did testimony from a criminal investigator regarding her prior knowledge of Appellant by his nickname, thereby implicating the existence of Appellant's criminal history, violate Rule 404 and Rule 403, SCRE, where the identification of Appellant was not challenged at trial?

II. Where multiple live witnesses testified at trial concerning the severity of the victim's injuries, did the trial court err in admitting police photographs of the victim's injuries?

Statement of the Case

In the early morning hours of May 3, 2012, officers from the Laurens County Police Department were dispatched to the Church Street Li'l Cricket located in Laurens, South Carolina. When the officers arrived, they found Dometry Williams ("Williams"), a sales associate at Li'l Cricket, crying and covered in blood. Williams informed the officers that Appellant Richard Sylvester Evans ("Evans") robbed the store, assaulted and stabbed her several times. Before Williams was transported by ambulance to Greenville Memorial Hospital, the officers took several photographs of Williams's injuries. After Williams was taken to the hospital, the police processed the crime scene and obtained evidence. Later that evening, after Williams was treated at the hospital, officers at the police department took additional photographs of Williams's injuries.

On July 6, 2012, the Laurens County Grand Jury indicted Evans on charges of armed robbery, attempted murder, grand larceny, kidnapping, and possession of a weapon during the commission of a violent crime. (R. pp. 2-16.) On March 4-6, 2013, the case came to trial before a jury with the Honorable Frank R. Addy presiding. The State moved forward on all counts of the June 6, 2012 indictment.

At trial, Williams testified that Evans was present in the store on the night in question and identified him from the witness stand as the perpetrator. She also testified that she had known Evans before this incident, but she had known him by his nickname, "Chilly Pop." The identification of Evans by Williams was not challenged on cross-examination. Later during the trial, Leann Rigott, an investigator for the City of Laurens Police Department, testified that she knew that Evans went by the nickname of "Chilly

Pop" based on prior dealings with him "in the community." Evans's counsel objected and moved for a mistrial, which the trial court denied.

Additionally, during the presentation of the State's case, the State moved to admit photographs depicting Williams's injuries. (R. pp. 302-303.) The State contended that the photographs depict the extent and severity of the assault on Williams and establish malice aforethought. Counsel for Evans contended that Williams testified about the extent of her injuries, showed her injuries to the jury, and therefore the admission of the photographs would be cumulative, prejudicial, was not probative, and served no purpose other than to inflame the jury. The trial court ruled in favor of the State in regards to the admissibility of the photographs. (R. p. 74, line 8-p. 78, line 1.)

The jury found Evans guilty on all charges. The trial court sentenced Evans to life imprisonment without parole on the armed robbery, attempted murder, and kidnapping charges; six months with credit for six months served on the grand larceny charge; and pursuant to section 16-23-490(a) of the South Carolina Code (2003 & Supp. 2012), the trial court found that because Evans received life sentences on the armed robbery, attempted murder, and kidnapping charges, there was no reason to sentence Evans on the charge of possession of a weapon during the commission of a violent crime. This appeal followed.

On March 21, 2013, counsel for Evans filed and served a Notice of Appeal. (R. p. 304.) On September 18, 2013, pursuant to the 2013 Appellate Practice Project, the Division of Appellate Defense moved to have Thornwell F. Sowell, III appointed as lead counsel for Evans, and by order dated September 19, 2013, this Court granted that motion. (R. p. 1)

Argument

I. The Trial Court Committed Reversible Error by Allowing Testimony from a Police Officer Regarding her Knowledge of Appellant's Nickname.

The State introduced testimony from Leann Rigott, an investigator with the Laurens City Police Department. Rigott testified that she responded to the scene and learned that the suspect was nicknamed "Chilly Pop." (R. p. 121, lines 11-13.) Rigott then stated she knew someone by that nickname, and she was immediately asked how she knew of the person whose nickname was "Chilly Pop." (R. p. 121, lines 18-22.) Rigott began to answer by stating, "[i]n the community," at which point defense counsel immediately objected and moved for a mistrial during an *in camera* hearing. (R. p. 121, line 24–p. 125, line 10.) The trial court denied the motion for a mistrial, and this Court should reverse and remand for a new trial.

At trial, Williams was the State's first witness and initially testified that around 12:15 a.m. on May 3, 2012, someone entered the store. (R. p. 26, lines 21-23.) When asked to identify who came in the store, Williams replied, "Richard Evans." (R. p. 26, lines 24-25.) The State then asked Williams if, on the date of the incident, she knew him as Richard Evans, and Williams testified that she knew him by his nickname, "Chilly Pop." (R. p. 27, lines 1-6.) Williams then identified Evans from the witness stand as the individual in the store on the night in question. (R. p. 27, lines 11-25.) Even after Williams testified that "Richard Evans" was the individual in the store, then provided his nickname "Chilly Pop," and then made an in-court identification, the State asked her again if she knew him as "Chilly Pop" on the date of the incident. (R. p. 28, lines 3—6.) On cross-examination, Evans's counsel never questioned Williams on her identification of Evans. (R. p. 57, line 14-p. 61, line 25.)

Later at trial, Riggot testified regarding her involvement with the investigation on behalf of the Laurens City Police Department. When she arrived at the scene, Riggot spoke with at least one police officer at the scene who informed Riggot that the officer had spoken with Williams. (R. p. 120, line 7-p. 121, line 8.) The following colloquy took place:

Q: As a result of that conversation, was there a nickname that you heard?

A: Chilly Pop.

MR. HOWE [Defense counsel]: Hearsay, Judge.

THE COURT: Overruled. Continue.

Q: Did you know anyone by that nickname?

A: Yes, sir, I did.

Q: Who did you know—well, first of all, let me ask you this. How did you know a person by that nickname?

A: In the community—

MR. HOWE: Your honor, objection.

(R. p. 121, lines 11-24.)

At that point, Evans' counsel moved for a mistrial,[1] arguing that Rigott's testimony improperly commented on past dealings with Evans and gave the obvious implication to the jury that Evans has a criminal history. (R. p. 122, line 22-p. 123, line 12.) Ultimately, the trial court denied the motion for a mistrial. When the State resumed questioning of Rigott, she was not again asked *how* she knew that "Chilly Pop" was

[1] Upon Evans' counsel's objection quoted above, the trial judge immediately sent the jury out of the courtroom and *sua sponte* expressed his concerns regarding testimony from Rigott as to "how she knows who Chilly Pop is." (R. p. 121, line 25-p. 122, line 12.)

Evans's nickname. (R. p. 125, lines 17-23.) Instead, she simply testified that she knew Evans's nickname was Chilly Pop and then made an in-court identification of Evans. (R. p. 126, line 10-p. 127, line 4.)

The trial court's failure to exclude Rigott's testimony regarding her familiarity with Evans constitutes reversible error, as the testimony violated Rules 404 and 403 of the South Carolina Rules of Evidence. Rule 404, SCRE, limits the circumstances when a defendant's character may be properly brought into evidence. *State v. Gonzalez*, 360 S.C. 263, 269, 600 S.E.2d 122, 125 (Ct. App. 2004), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005). Subsection (a) of the rule reads in relevant part: "Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." Rule 404(a), SCRE. Furthermore, pursuant to this rule, South Carolina courts have held that while "[e]vidence that police began an investigation because of reports of criminal activity [is] admissible . . . identification of an individual as the suspect of a criminal investigation, based upon speculation and effectively calling into question that individual's character, is not." *Gonzalez*, 360 S.C. at 269, 600 S.E.2d at 126 (citing *State v. Jones*, 343 S.C. 562, 575, 541 S.E.2d 813, 820 (2001)).

Additionally, evidence of other crimes, wrongs, or acts is inadmissible to prove the character of a person in order to show action in conformity therewith; however, such evidence may be admissible "to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Rule 404(b), SCRE. The evidence admitted "must logically relate to the crime with which the defendant has been charged." *State v. Beck*, 342 S.C. 129, 135, 536 S.E.2d 679, 682–83 (2000). As the

Gonzalez court noted, "[t]he purpose of Rule 404 is to exclude evidence that tends to prove a defendant's guilt based merely on his reputation or character, i.e. evidence which implies 'because this person is a bad guy or acted in a manner similar to this before, he is guilty'." *Gonzalez*, 360 S.C. at 270, 600 S.E.2d at 126.

If bad act evidence falls within the Rule 404(b) exception, it must nonetheless be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *See* Rule 403, SCRE (although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice); *State v. Lyle*, 125 S.C. 406, 417, 118 S.E. 803, 807 (1923). "Unfair prejudice means an undue tendency to suggest decision on an improper basis." *State v. Dickerson*, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000).

In this case, Rigott's testimony that she knew the identity of Chilly Pop based on prior dealings with him "in the community" was improper under Rule 404, SCRE. Although the State argued that Rigott's testimony was necessary to link Williams's identification of "Chilly Pop" as Evans, the record reflects otherwise. Williams first testified that "Richard Evans" was the individual in the store, and she then identified him from the witness stand. (R. p. 26, lines 24-25; R. p. 27, lines 11-25.) Subsequently, the State prompted Williams to provide Evans's nickname. (R., p. 28, lines 3-6.) The identification of Evans's presence in the store was not challenged on cross-examination. (R. p. 57, line 14-p. 61, line 25.)

By the time Rigott testified, the identification of Evans was not an issue in the case, and Rigott's testimony was entirely cumulative and unnecessary. Therefore, Rigott's testimony did not meet any of the exceptions in Rule 404(b), and it violated Rule

404 by impugning Evans's character and implicating to the jury that he had been involved in prior criminal conduct. "Evidence concerning a defendant's tattoo or nickname is not prejudicial when used to prove something at issue in a trial, such as the identification of the defendant." *State v. Day*, 341 S.C. 410, 422, 535 S.E.2d 431, 437 (2000) (citing *Stevenson v. Texas*, 963 S.W.2d. 801 (Tex. App. 1998)). On the other hand, evidence of a nickname that is only used to attack the defendant's character is prejudicial and constitutes reversible error.

In *Day*, the South Carolina Supreme Court reversed the defendant's convictions for murder and possession of a firearm during the commission of a violent crime, in part due to the evidence presented regarding the defendant's tattoos and nickname of "Outlaw." The Court determined that the reference to the nickname was not used for any other purpose other than to attack his character, as it had no bearing on any facts in controversy. 341 S.C. at 422-423, 535 S.E.2d at 437-438.

Likewise, in the present case, Rigott's testimony as to *how* she knew "Chilly Pop" only gave the jury the impression that Evans had been in trouble before and provided an improper basis for their decision. It constituted evidence of prior bad acts inadmissible under Rule 404, and it was not probative of any matter in controversy—i.e., identity, that would satisfy an exception under Rule 404(b). Even if Rigott's testimony was relevant on the issue of identification, the prejudice resulting from the inference of Evans' prior criminal acts substantially outweighs the probative value of such testimony, in light of Williams's unchallenged prior testimony and in-court identification. *See* Rule 403, SCRE. Accordingly, this Court should reverse Evans's convictions and remand for a new trial.

II. The Trial Court Erred in Admitting the Police Photographs Depicting Williams's Injuries.

The State sought to introduce photographs of Williams's injuries into evidence. Over the objection of the defense, the trial court allowed the photographs to be admitted into evidence because, "as they say, a picture is worth a thousand words." (R. p. 77, line 9-p. 78, line 1.) This Court should reverse and remand this case for a new trial.

At trial, Williams testified that just after midnight on May 3, 2012, she was working alone at Li'l Cricket stocking a cooler when Evans entered the store. (R. p. 21, lines 6-20; R. p. 23, lines 3-24; R. p. 24, lines 7-11; R. p.; 26, lines 6-25; R. p. 28, lines 7-15.) According to Williams, Evans walked to a cooler and got a beer. (R. p. 29, lines 17-24.) Williams spoke to Evans and walked to the front counter. (R. p. 30, lines 14-25.) After Williams got behind the counter, Evans came up behind her, wrapped his hand around her neck, told Williams that he was going to rob her, and demanded that she open the register and give him the money in the register. (R. p. 31, line 1-p. 32, line 4.) Williams testified that Evans subsequently put a hunting knife to her neck, took her to a store room, struck her several times, and stabbed her several times with the knife. (R. p. 32, lines 11-17; R. p. 34, lines 3-21; R. p. 35, lines 2-18; R. p. 38, line 19-p. 39, line 16; R. p. 42, line 16-p. 43, line 23.) Williams testified that she pled for her life and "remember[s] grabbing his wrist with the knife, trying to defend myself." (R. p. 134, lines 5-18.) As she struggled to get away from Evans, Williams grabbed the blade of the knife. (R. p. 41, line 19-p. 42, line 4; R. p. 43, line 3-p. 44, line 4.) At some point, Evans "just stopped and he turned around, then told me not to get up and I said 'okay, I am not gonna get up.'" (R. p. 44, lines 2-14.) Evans then fled the store in Williams's car. (R. p. 53, lines 8-20; R. p. 64, line 22-p. 65, line 19.)

Williams testified that as a result of the attack, she had lacerations on both hands requiring twenty-nine stitches on her left hand and nineteen stitches on her right hand. (R. p. 47, lines 10-24.) She also received cuts to her neck and chest area. (R. p. 47, line 25-p. 48, line 4.) Upon request by the State, the trial court allowed Williams to show the jury the scars on her body from the attack. (R. p. 47, line 25-p. 49, line 1.)

Witness Shasha Fiona Simpson ("Simpson") arrived at the store to purchase gas just after Evans fled the scene. (R. p. 64, line 11-p. 65, line 6.) Simpson testified that she "could see someone running from the back [of the store] hysterically. . . . [S]he was just running towards the door as I was walking towards the door to go into the store." (R. p. 65, line 20-p. 66, line 7.) Simpson testified that Williams "was yelling 'Help me, help me, I've been robbed[]'" and that Williams "was kinda slouched over like she was holding one of her arms or holding something like she was—she was kinda slouched over as she was running." (R. p. 67, lines 2-12.) Simpson testified that "[t]here was a lot of blood" on Williams, "a whole bunch of blood on her abdomen. Just from her being slouched over, she was covered in blood." (R. p. 67, lines 13-25.) Simpson observed that Williams "had a gash on her arm or hand, somewhere in that area, so I tried to find any bandages or things to wrap it up to keep it from bleeding." (*Id.*)

Thomas Jared Hunnicutt ("Hunnicutt") was, at the time, a sergeant at the Laurens Police Department in May of 2012 who responded to the scene at Li'l Cricket. (R. p. 70, line 8-p. 71, line 6.) The first thing Hunnicutt observed upon entering the store was Williams. (R. p. 71, lines 10-11.) Hunnicutt testified that Williams "had large lacerations on both hands." (R. p. 72, lines 1-3.) According to Hunnicutt, the larger laceration "was on her left hand. It looked to be almost to the bone." (R. p. 72, lines 4-5.)

Hunnicutt noted that Williams also had small cuts to her neck "and some abrasions—various abrasions on her face and neck." (R. p. 72, lines 5-9.) Several other officers arrived at the scene and took photographs of Williams's injuries. (R. p. 73, line 4-p. 74, line 12.)

Rule 403 of the South Carolina Rules of Evidence states that "[a]lthough 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." Rule 403, SCRE. "The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court." *State v. Green*, 397 S.C. 268, 287, 724 S.E.2d 664, 673 (2012), *reh'g denied* (May 3, 2012) (citing *State v. Kornahrens*, 290 S.C. 281, 350 S.E.2d 180 (1986)).

"Ordinarily, it is not an abuse of discretion to admit photographs that corroborate testimony." *State v. Elders*, 386 S.C. 474, 483, 688 S.E.2d 857, 862 (Ct. App. 2010) (citing *State v. Hambright*, 310 S.C. 382, 388, 426 S.E.2d 806, 809 (Ct. App. 1992)). However, "'[t]he trial judge must balance the prejudicial effect of graphic photographs against their probative value.'" *State v. Vang*, 353 S.C. 78, 87, 577 S.E.2d 225, 229 (Ct. App. 2003) (quoting *State v. Hughey*, 339 S.C. 439, 450, 529 S.E.2d 721, 727 (2000)). "Probative" means "[t]ending to prove or disprove." *Black's Law Dictionary* 1323 (9th ed. 2009). "'[T]he more essential the evidence, the greater its probative value.'" *State v. Collins*, 398 S.C. 197, 202, 727 S.E.2d 751, 754 (Ct. App. 2012), *reh'g denied* (Sept. 20, 2012) (quoting *United States v. Stout*, 509 F.3d 796, 804 (6th Cir. 2007)). "Thus, a court

analyzing probative value considers the importance of the evidence and the significance of the issues to which the evidence relates." *Collins*, 398 S.C. at 202, 727 S.E.2d at 754.

"'Like probative value, unfair prejudice should be evaluated in the practical context of the issues at stake in the trial of the case.'" *State v. Lee*, 399 S.C. 521, 732 S.E.2d 225 (Ct. App. 2012), *reh'g denied* (Sept. 20, 2012) (quoting *Collins*, 398 S.C. at 208, 727 S.E.2d at 754.) "'To constitute unfair prejudice, the photographs must create 'an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.'" *State v. Holder*, 382 S.C. 278, 290, 676 S.E.2d 690, 697 (2009) (quoting *State v. Jackson*, 364 S.C. 329, 334, 613 S.E.2d 374, 376 (2005), quoting in turn *State v. Alexander*, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991)). "'[P]hotographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions.'" *Elders*, 386 S.C. at 483, 688 S.E.2d at 862 (quoting *State v. Brazell*, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997)).

In the present case, State's Exhibits 6-10 are, at best, minimally probative and were introduced into evidence simply to arouse the sympathy or prejudice of the jury. Williams and two witnesses testified about the extent of Williams's injuries. Williams was afforded the opportunity to show the physical evidence that resulted from the attack to the jury. (R. p. 47, line 25-p. 49, line 1.) The fact that Evans attacked Williams with a knife was readily understood on the basis of the other evidence presented in the case including Williams's testimony. Therefore, it cannot be said that the photographs were necessary to substantiate material facts or conditions or necessary to corroborate testimony.

Additionally, the photographs were not necessary to prove the guilt of Evans. According to the State, the photographs were introduced primarily to establish the severity of the assault:

> Your Honor, I don't know how it could be more probative than in an attempted murder case. We haven't seen—*the jury has not been able to see the extent of, particularly, this injury to her hands*. Also, on the night of the injury, you know, she was put in the ambulance and that was at the time the knife was to her throat. So, Your Honor, I think that it goes directly to the attempted murder charge, as to the extent of the assault and the malice aforethought that we have to prove in this case. So, Your Honor, that *we need those pictures to further demonstrate to this jury how severe the assault was*.

(R. p. 76, line 15-p. 77, line 4 (emphasis added).)

However, in the present case the jury heard the testimony of Williams as well as two other witnesses concerning Williams's injuries, including one witness who testified that the larger laceration "was on her left hand. It looked to be almost to the bone." (R. p. 72, lines 4-5.) Moreover, the jury was able to view the resulting scars Williams has sustained as a result of the attack. (R. p. 47, line 25-p. 49, line 1.) Thus, the severity of the assault was manifest without the photographs.

Finally, "[a] person who, with intent to kill, attempts to kill another person with malice aforethought, either express or implied, commits the offense of attempted murder." S.C. Code Ann. § 16-3-29 (Supp. 2012). Attempted murder is codified in South Carolina Code section 16-3-29 (Supp. 2012) and, as a result of 2010 Act No. 273 § 6.A, now covers the crime of assault and battery with intent to kill ("ABWIK"). S.C. Code Ann. § 16-3-29, note ("[W]herever in the 1976 Code reference is made to assault and battery with intent to kill, it means attempted murder as defined in Section 16-3-

29."). ABWIK is "'an unlawful act of a violent nature to the person of another with malice aforethought, either express or implied,' and "'comprises all the elements of murder except the death of the victim.'" *State v. Dennis*, 402 S.C. 627, 638, 742 S.E.2d 21, 27 (Ct. App. 2013), *reh'g denied* (May 23, 2013) (quoting *State v. Wilds*, 355 S.C. 269, 275, 584 S.E.2d 138, 141 (Ct. App. 2003)). "ABWIK requires at least a general intent to kill, which the jury may infer from 'the use of a dangerous or deadly weapon in a manner reasonably calculated to cause death or great bodily harm.'" *Dennis*, 402 S.C. at 638, 742 S.E.2d at 27 (quoting *State v. Foust*, 325 S.C. 12, 16, n.4, 479 S.E.2d 50, 52, n.4 (1996)). "'[T]he manner in which the instrument was used, the purpose to be accomplished, and the resulting injuries may also prove intent.'" *Dennis*, 402 S.C. at 638, 742 S.E.2d at 27 (quoting *State v. Coleman*, 342 S.C. 172, 176, 536 S.E.2d 387, 389 (Ct. App. 2000)).

In the present case, the fact that Evans had and used a knife during the attack, the manner in which Evans used the knife, and the severity of Williams's injuries were evident from the testimony of several witnesses. The photographs were not necessary to establish these facts. Assuming that the pictures contain something of probative value for the State's case, their minimal value fails to outweigh the prejudicial impact the photographs may have had on the jury. This Court should therefore reverse the decision of the trial court.

Conclusion

For the reasons stated herein, Appellant respectfully requests that his convictions be reversed and that this case be remanded for a new trial.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I certify that I have served the Final Brief of Appellant on Respondent State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on June 10, 2014, addressed to its attorney of record, Jared Q. Libet, Assistant Attorney General, Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211.

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