THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

Kristi L. Harrington, Circuit Court Judge

Case No. 2012-213734

The State of South Carolina,..... Respondent,

v.

James Lamont Moore, ... Appellant.

INITIAL REPLY BRIEF OF APPELLANT

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ARGUMENT

I. Respondent misconstrues the full context and importance of the State's video exhibit and the improper character statements contained therein.

The South Carolina Supreme Court has "defined the term 'character,' as a 'generalized description of a person's disposition or a general trait such as honesty, temperance, or peacefulness.'" *State v. Brown*, 344 S.C. 70, 74, 543 S.E.2d 552, 554 (2001) (citing *State v. Nelson,* 331 S.C. 1, 7, 501 S.E.2d 716, 718 (1998)). Character evidence is "[e]vidence regarding someone's personality traits or propensities, or a praiseworthy or blameworthy nature; evidence of a person's moral standing in a community." *Black's Law Dictionary* 636 (9th ed. 2009).

Appellant's trial counsel objected to (1) "preliminary discussions" on the State's video exhibit between the confidential informant ("Mr. Ancrum") and the police officers and (2) statements offered by Mr. Ancrum later in the video made during and after the alleged drug-buy in violation of Rules 403, 404(a),[1] and 404(b)[2] of the South Carolina Rules of Evidence. (Tr. p. 19, 28, 33, 35). Respondent misconstrues the specific references to Appellant in the video as to each set of statements. Respondent argues (1) that these remarks did not refer to any prior bad acts by Appellant and (2) that the comments were "too vague" to be attributable to Appellant.

A. Respondent incorrectly argues that the statements related to Appellant's conduct of prior drug-sale solicitation were not attributable to Appellant.

Respondent relies on three definitions for the words "holler" and "hollering" to demonstrate that this case is distinguishable from *German v. State*, 325 S.C. 25, 478 S.E.2d 687 (1996) and *State v. Bostic*, 307 S.C. 226, 414 S.E.2d 175 (1992) and to show that the statements

[1] No exception to Rule 404(a) applies to this case nor does Respondent so argue. *State v. Bostick*, 307 S.C. 226, 228, 414 S.E.2d 175, 176 (Ct. App. 1992) (The State cannot attack the character of the defendant unless the defendant himself first places his character in issue).

[2] The State did not raise any exception to prior bad act evidence under Rule 404(b) at trial nor did the trial court reference any Rule 404(b) exception in its ruling. Further, Respondent makes no reference to any 404(b) exception.

at issue did not weigh on Appellant's character or constitute evidence of prior bad acts. (R. Brief p. 9). Respondent urges that because "holler" is not defined in the dictionary as solicitation of drug sales, holler or hollering "did not refer to any prior bad acts of Appellant." (*Id.*). However, both the solicitor and the State's witness, Detective Shealy, recognized that there is vernacular particular to the drug dealing context.[3] For example, in testifying for the State, Detective Shealy interpreted the slang "20 hard," used by Mr. Ancrum in the video, as 20 dollars worth of cocaine base and that "[Appellant] kn[ew] what [Mr. Ancrum] mean[t]." (Tr. p. 183).[4]

Similarly, Appellant's trial counsel objected to "holler" and "always hollering" on the basis that the only logical implication, as opposed to a mere possibility, was that Appellant had a history and conduct of drug-sale solicitation exhibited by always hollering, yelling or calling out to Mr. Ancrum. Not only was this important to the initiation of the drug-buy location but Appellant's alleged conduct specifically aided *who* the officers selected to target.

Respondent argues that many of the hollering "statements were not connected with Appellant because they referred to more than one person at a location or an unidentified person." (R. Brief p. 10). However, Respondent fails to address the specific statements describing Appellant. Indeed, the terms "he" and "the one" is unmistakably a reference to one person and

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[3] The State conceded that this language could mean something other than a dictionary definition. During pre-trial motions, the solicitor acknowledged that "[h]ollering at could mean a variety of things . . . I think perhaps in certain circles those are the implications [solicitation of drug purchases]." (Tr. p. 26). Further, although the State contented that these statements did not indicate that Appellant was a drug dealer, the State agreed "there's a different vernacular for – and lingo for people who are on the street." (*Id.* at 38).

[4] Detective Shealy's testimony about the meaning of "20 hard" is not on appeal even though Appellant's trial counsel objected to same. (Tr. p. 183). This testimony is cited to demonstrate that there is language outside of traditional and even non-traditional dictionaries that still has communicative importance in the drug-dealing context. Respondent cites to the American Heritage Dictionary, Webster's New World Dictionary, and Urban Dictionary to show that "holler" does not refer to any prior bad act for the purposes of this Appeal. "20 hard" is not found in any of the above dictionaries.

not a group of individuals as Respondent suggests. Further, Respondent ignores the following dialogue captured in the video, objected to by Appellant's trial counsel, and raised on Appeal:

> Officer: I'm going to drop you off at the same spot . . . you know that house right across from that gas station the boys always holler at you?[5]
>
> Mr. Ancrum: Oh you want that one?
>
> Officer: Yep.
>
> Mr. Ancrum: If ***he*** out there.
>
> Officer: Yep. ***He be always out there*** . . . always hollering at you right there right across from that gas station.
>
> Mr. Ancrum: Yeah . . . Oh you talking about ***the one holler at me all the time*** when I go through there on the left-hand side?
>
> Officer: First intersection.
>
> Mr. Ancrum: Yeah, okay.

(State's Exh. 3 at 1:12-1:44) (emphasis added).

The record further demonstrates that Appellant was individually targeted based on Appellant's prior conduct. When asked whether officers target a location or a person when conducting a drug-buy, the State's witness, Detective Grill, responded, "you can target both. It really depends on your informant's capabilities and your end objective . . . [y]ou can target individuals if your informant knows an individual and going to send them to that individual . . ." (Tr. p. 109). As to this specific operation, Detective Grill stated, "[w]hen we were out there on the way to drop the informant off . . . we identified a guy that was – our surveillance units, and saw some individuals hanging out in the area of the gas station . . ." (*Id.* at 117). Here, Mr.

[5] Clearly Appellant agrees that "the boys" references more than one person to identify a location. However, the statements immediately following demonstrate that the conversation is directed toward Appellant as the target based on his prior conduct.

Ancrum knew exactly who the officers referenced as indicated by as "***the one holler at me all the time*** when I go through there on the left-hand side." (State's Exh. 3 at 1:12-1:44).

The State's video exhibit further illustrates the improper inference that Appellant was at the location soliciting drug-sales. During Mr. Ancrum's narration of the drug-buy he stated, "that the same guy [Appellant] that be in the yard all the time, be yelling at me." (State's Exh. 3 at 9:40-10:30). Mr. Ancrum then stated to Appellant, "I pass you all the time some time" but that "I done call [my] boy down the street" for drugs.[6] (*Id.* at 11:00-11:25). He then promised to "holler back" to Appellant with the intention of calling in the future for drug purchases.[7] Appellant's trial counsel understood the meaning of this vernacular and the context in which it was used, as did the State's witness, which is precisely why Appellant's counsel in pre-trial objected to all of the above statements as "unfairly prejudicial and a prior bad act, 404(b), and improper comment on the character." (Tr. p. 20, 35).

B. Respondent incorrectly argues that the statement that Appellant "caused all the problems" was not preserved for this Appeal and was not made in direct reference to Appellant.

Respondent argues that the statement that Appellant "caused all the problems" was not preserved because trial counsel never made mention of that particular statement. (R. Brief p. 12). On the contrary, as basis for his motion to exclude "preliminary discussions" from the State's video exhibit, Appellant's trial counsel stated, "once the comments refer specifically to the defendant, then under *German* that would be an improper comment on issues on [his] character. And what I'm taking about on the video, in the beginning of the video they are preparing the

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[6] Detective Shealy interpreted this portion of the video for the jury explaining that the confidential informant "normally go[es] down the street" to buy drugs . . . to "make it look normal." (Tr. p. 184).

[7] Detective Shealy confirmed that this is what the confidential informant meant in the video. On the witness stand, Detective Shealy interpreted the video for the jury where the confidential informant says that he "will holler back" by stating "[s]ee he's [the confidential informant] explaining . . . [n]ext time I come through I'll call you" to purchase drugs. (Tr. p. 184).

confidential informant." (Tr. p. 18). Respondent correctly points out that this statement was made over the radio by an officer not present in the vehicle. (R. Brief p. 13). However, Respondent's assertion that this statement "is not clearly making reference to Appellant at that point in the video" is misguided. (*Id.*). Appellant's trial counsel objected to "th[e] whole conversation" on the radio where the officer on the radio is asked identifying information about Appellant – namely whether Appellant was wearing a blue cast – to which the officer responded, "Yeah, probably. That's the one that caused all the problems." (State's Exh. 3 at 6:01-6:17). Respondent admits that the statements came through the radio. (R. Brief p. 13). Appellant's trial counsel specifically objected to the statements that came in on the radio. (Tr. p. 27-28). Appellant's trial counsel renewed his objection at the time the evidence was offered at trial. (Tr. p. 131). This issue is properly before this Court.

To Respondent's argument on the merits, the statement that Appellant "caused all the problems" is not as benign as Respondent suggests. (R. Brief p. 12). Respondent speculates that it was "doubtful" that the jury would connect this statement with Appellant because of the "utter vagueness" of the comment. (*Id.* at 13). However, this statement was important to the officers' preliminary discussions with the confidential informant on the way to the drug-buy to identify the individual alleged to be Appellant. Because these statements are close in time with statements concerning Appellant's frequency and propensity to solicit drug-sales, the trial court should have excluded this portion of the State's video exhibit under Rules 403, 404(a), and 404(b).

C. Respondent agrees that the present sense impression exception to hearsay is improper to the extent that the trial judge admitted statements describing past events.

In a footnote, Respondent argues that the "ruling regarding present sense impressions appears to address defense counsel's second argument at trial" regarding "improper prior consistent statements." (R. Brief p. 11). However, the trial court never mentions prior consistent statements in making its ruling under the present sense impression exception. Appellant's trial counsel objected to improper character and unduly prejudicial statements captured on the video before, during, and after the drug-buy. (Tr. p. 33).[8] Indeed, the prior consistent statements and the objectionable character statements were in the "same narration." (*Id.*). In admitting the video exhibit in full, the trial court ruled that because the solicitor intended to "use the video that it most definitely will be a present sense impression if she is not going to question and go step by step on the video but just play the video as a recorded recollection of what happened."[9] (*Id.* at 40-41). Therefore, to the extent that the trial court allowed the video statements weighing on Appellant's character and prior bad acts under the present sense impression exception, the trial court must be reversed.

D. The error committed by the trial court cannot be held harmless or insubstantial contrary to Respondent's argument.

The evidence of guilt in this case is not as overwhelming as Respondent suggests. (R. Brief p. 14-15). At trial, the State relied on the testimony of three officers and the confidential

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[8] During the transaction the confidential informant stated, "I pass you all the time some time" but that "[he] done call [his] boy down the street" for drugs. (State's Exh. 3 at 11:00-11:25). After the drug-buy and as the confidential informant walked back to the officers' vehicle, the confidential informant stated "I straight. I'm on my way back . . . The one with the blue cast on. That's who I get [the drugs] from." (*Id.* at 14:30-14:40).

[9] Notably, and as mentioned in Appellant's initial brief, the State played the video twice during trial, which appears to go against the trial court's ruling: first in full when Mr. Ancrum was on the stand and second when Detective Shealy was on the stand. Detective Shealy took the jury "step by step" through a portion of the testimony. Appellant's trial counsel objected to Detective Shealy's direct interpretation of the drug buy. (Tr. p. 183).

informant. The video exhibit was critical to the State's case because the video allegedly identified Appellant and was used to capture statements and events before, during and following the alleged drug-buy. (Tr. p. 29, 117-18; 154-55, 183, 201-02). However, Detective Shealy who arranged the drug-buy, and who reviewed and interpreted the video for the jury, testified that he did not see any drugs in the video, any money, or anything exchange hands. (*Id.* at 190). Detective Shealy waited almost a month to draft a warrant for Appellant's arrest. (*Id.* at 190-91). Another officer monitoring the drug-buy did not observe the actual drug-buy until later reviewing the video. (*Id.* at 124). In addition, Appellant's trial counsel identified Mr. Ancrum's numerous credibility issues, specifically that his prior conviction of stolen goods and a crime of dishonesty. (*Id.* at 208). Further, Mr. Ancrum admitted to lying on the stand in a prior drug-buy case. (*Id.* at 142-145). In addition, although Appellant's trial counsel stipulated that the drugs offered as an exhibit by the State was cocaine, he clarified that did not stipulate that the cocaine was attributable to Appellant. (*Id.* at 207-08). Finally, and perhaps most importantly, Appellant's trial counsel objected to the admission of the video exhibit before and during trial. *State v. Schumpert,* 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993) (noting that any error in admission of evidence cumulative to other unobjected-to evidence is harmless). When statements were offered to interpret the video, Appellant's trial counsel objected. (*Id.* at 183). For these reasons, the trial court's error was not harmless and cannot be overcome by the evidence presented at trial.

II. Contrary to Respondent's Argument, Appellant's trial counsel properly objected to Appellant's trial *in absentia*.

Respondent cites *State v. Ravenell* to support the argument that Appellant's trial counsel waived the right to appeal Appellant's trial *in absentia* by failing to "object at the first opportunity to do so, and failure to so object constituted waiver of the issue on appeal." 387 S.C. 449, 456, 692 S.E.2d 554, 558 (Ct. App. 2010). After Appellant's trial counsel stated that he

didn't believe that Appellant was coming to trial, the trial court decided to begin trial and stated: "Let's do our motions in this case. I note your objections, Mr. King, and that your client is not here . . . I've given, I believe, ample time and you've made ample efforts." (Tr. p. 12). Following pre-trial motions, the trial court recessed until the following day whereupon Appellant was not present. (*Id.* at 58). Again, the trial court stated, "Mr. King, I will note your objection that you do not wish to go forward but we are going to go forward." (*Id.*). The trial court acknowledged Mr. King's objections to Appellant's trial *in absentia* both before pre-trial motions and immediately upon commencing trial and before the jury was selected. This issue is preserved for Appeal.

CONCLUSION

For the reasons set forth herein, and for the reasons stated in Appellant's Initial Brief, Appellant requests that this Court reverse the trial court and remand for a new trial.

Respectfully submitted,

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Columbia, South Carolina

This 5 day of June, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi L. Harrington, Circuit Court Judge

Case No. 2012-213734

THE STATE,..... Respondent,

v.

JAMES LAMONT MOORE, ... Appellant.

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellant, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

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June 5, 2014

Hand Delivered

The Honorable Jenny Abbott Kitchings
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RE: Appeal From Charleston County
State of South Carolina v. James Lamont Moore
Appellate Case No. 2012-213734
Our File No.: 38769/01511

Dear Ms. Kitchings:

Enclosed please find the Initial Reply Brief of Appellant and Designation of the Matter to be Included in the Record on Appeal in the above-captioned matter. Please file the original and return a clocked-in copy to us via our courier.

By copy of this letter to all counsel, we are serving them with a copy of same.

Very truly yours,

Brandon S. Smith

BSS:ljs
Enclosures
cc: Christina J. Catoe, Esquire
Robert Michael Dudek, Esquire