STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Orangeburg County
Honorable Carmen T. Mullen, Circuit Court Judge
Appellate Case No. 2012-212989

THE STATE,

Respondent,

v.

JEFFREY E. MORTON,

Appellant.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

1. The Trial Court erred in allowing testimony of prior bad acts when the prior bad act was not established by clear and convincing evidence, by ruling that the unfair prejudice of the prior bad act testimony was substantially outweighed by its probative value.
2. The Trial Court erred in refusing to grant Appellant a directed verdict of acquittal on the attempted murder charge when there was no direct evidence of malice and where the circumstantial evidence was not substantial, but rather was sufficient only to raise mere suspicion of guilt.

STATEMENT OF THE CASE

Appellant Jeffery E. Morton was indicted at the February 2012 term of the Orangeburg County Grand Jury for one count of attempted murder. Appellant proceeded to trial, and on September 9, 2012, a jury convicted Appellant of the lesser included offense of assault and battery of a high and aggravated nature (ABHAN). The Honorable Carmen T. Mullen sentenced Appellant to twenty years imprisonment, provided upon the service of twelve years imprisonment and five years probation. Appellant subsequently filed a timely notice of appeal.

STATEMENT OF FACTS

Dwayne Robinson (Victim) is married to Appellant's ex-wife. R. p. 6. Appellant's daughters live with Victim and his wife. R. p. 7.

Victim had two surveillance cameras, the power cord for one of which was previously cut by an unknown person. R. p. 8. Victim's vehicles were previously vandalized by an unknown perpetrator. R. p. 9. Around 4:30 AM on the morning of November 7, 2011, Victim walked outside to check the weather, as was his custom. R. p. 9. Victim heard a person behind the vehicles in his driveway. Id. Victim reached down to pick up a brick and yelled for his wife to call 911. Id. Victim yelled for his wife to get his gun. R. p. 10. At that point, the assailant rushed towards Victim. Id. The assailant was dressed in black and was wearing gloves. R. p. 18. He was also wearing a ski mask. R. p. 21. Victim grabbed the assailant, and the assailant stabbed Victim in his side. Id. While they were fighting, Appellant stabbed victim once again. R. p. 12. Victim gained control of the assailant and recognized him as Appellant. R. p. 10. Appellant threatened, "I'm going to jail. When I get out, I'm going to kill you." Id.

Corporal Terrance Smith arrived and ordered Appellant to drop the knife. R. p. 20. Victim testified that after Appellant was handcuffed, another officer arrived and asked what was going on. Victim replied that Appellant came there to stab his tires. Appellant immediately blurted out, "I didn't come to stab your tires, I came to take care of you." R. p. 11. Lieutenant Craig Davis testified Appellant said he "didn't come to stab his tires, he came to stab him [Victim]." R. p. 19. Corporal Steven Thompson testified the Appellant's words were, "I didn't come to stab your tires, I came to stab you." SROA. p.1.

Victim identified Appellant in court as the person who stabbed him. R. p. 13. Victim's wife also identified Appellant as the man who was fighting with her husband. R. p. 14.

Corporal Terrance Smith found a pair of plastic gloves inside Appellant's black gloves. R. p. 22. Corporal Thompson identified a pair of wire cutters and a roll of scotch tape that were recovered at the scene of the attack. R. p. 23. Victim's wife testified she noticed after the attack there was a piece of paper on the ground in front of the exterior camera, as if it had been taped over. R. pp. 15-16. Corporal Thompson testified there was a sheet of paper taped over the window in front of the interior-mounted camera. Corporal Thompson located Appellant's vehicle on a dirt road on the other side of some woods behind Victim's apartment. R. pp. 24-25. Investigator William Ketcherside testified the vehicle contained binoculars, a digital camera, and another facemask. R. pp. 27-28.

Richard Childers, of Orangeburg County EMS, testified Victim had two stab wounds: one to his abdomen and one to his upper back. R. p. 26.

I.

The trial court did not err in admitting evidence that Appellant had previously made threats towards Victim because the reference to the prior threats showed Appellant's intent to commit attempted murder. Further, any error is harmless where Appellant was convicted of ABHAN rather than attempted murder.

Standard of Review

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Decisions to admit or exclude evidence rest in the sound discretion of the trial judge and will only be reversed on appeal for an abuse of discretion. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE. "A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice." State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995). "Prejudice occurs when there is reasonable probability the wrongly admitted evidence influenced the jury's verdict." State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011).

Argument

Appellant argues "the Trial Court erred in allowing testimony of prior bad acts when the prior bad act was not established by clear and convincing evidence and in finding that the unfair prejudice of the prior bad act testimony was substantially

outweighed by its probative value." App. Br. p. 6. However, the prior threats were admissible as proof of intent, so the trial court did not err.

After jury selection, Appellant's counsel made a motion to exclude evidence of threatening text messages sent from Appellant's phone to Victim. Appellant was charged with unlawful communication based upon the alleged text messages; however, at the time of trial, Appellant had not been convicted of sending the harassing texts. The texts were sent about ten months prior to the Victim being stabbed. R. p. 1.

Prior to ruling on the admissibility, the judge asked the solicitor, "So what exception to 404(b) are you wanting to use, and, as you know, if it's not a result of a conviction it has to be able to be proven by clear and convincing evidence." R. p. 2.

After arguments from the solicitor and defense counsel, the trial judge ruled as following:

> Well he can say that he received, and I say he, the victim, - the victim can say that he was threatened by who he believes to be Mr. Morton, coming from Mr. Morton's cell phone, threatening him. I think that's fair game. That does show intent. I don't know how else he's going to show malice in this case.

R. p. 4.

The judge went on to say, "Well, respectfully I think under 404(b) is exactly what it's designed for. This is not a character issue as to your client. This goes to prove intent ... This is not necessarily an identity issue; is that correct?" R. pp. 4-5.

And the judge finishes, "All right. Respectfully, I also think it is relevant. Clearly, he can – I think the probative value outweighs the prejudice under 403. So I'm going to allow it." R. p. 5.

At trial, the only reference to the threats found in the text messages came when the solicitor asked Victim, "Now, were you aware during that time period leading up to November, 2011, whether he [Appellant] had made some threats towards you?" To which Victim replied, "Correct. He did." Defense counsel immediately objected, and the judge overruled the objection. R. p. 7. After the objection, the solicitor moved on to another topic, and the text messages were not admitted into evidence. Nor was there any subsequent mention at trial of any other prior bad acts.

Generally, evidence of prior bad acts is not admissible to prove a defendant's guilt for the charged crime. State v. Pagan, 369 S.C. 201, 211, 631 S.E.2d 262, 267 (2006). "This is so because under our system of justice, a conviction must be based upon evidence of the offense for which the accused is on trial rather than upon prior criminal or immoral acts." State v. Hough, 319 S.C. 104, 107, 459 S.E.2d 863, 865 (Ct. App. 1995). However, pursuant to 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) (recognizing evidence of other crimes is competent to prove a charged offense if it tends to establish: (1) motive; (2) intent; (3) the absence of mistake or accident; (4) common scheme or plan; or (5) identity). Furthermore, in order to be admissible, the prior bad act must logically relate to the charged offense. State v. Fletcher, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008). "Stated differently, evidence which is 'logically relevant to establish a material element of the offense charged is not to be excluded merely because it incidentally reveals the accused's guilt of another crime." State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009) (quoting State v. Green, 261 S.C. 366, 371, 200 S.E.2d

74, 77 (1973)). If there is any evidence to support the admission of bad act evidence, the trial judge's ruling cannot be disturbed on appeal. State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). State v. Martucci, 380 S.C. 232, 252, 669 S.E.2d 598, 609 (Ct. App. 2008).

Appellant argues that the evidence of prior threats made by Appellant to Victim went to proving "Morton's propensity to commit the crime for which he was charged, which is clearly forbidden in South Carolina." App. Br. p. 7. However, in the present case, the evidence of Appellant's prior threats to Victim was admitted to show Appellant's intent to commit murder, not his propensity to do so. South Carolina jurisprudence contains many cases where prior threatening behavior has been admitted to show intent. This Court has held evidence of prior domestic violence was admissible to show intent where the defendant maliciously sought to inflict harm upon an ex-girlfriend and her new boyfriend. See State v. Sweat, 362 S.C. 117, 606 S.E.2d 508 (Ct.App.2004). The South Carolina Supreme Court has further held that in homicide cases, "evidence of previous quarrels and ill feelings or hostile acts between parties is admissible to show that animus probably existed between the parties at the time of the homicide." State v. Braxton, 343 S.C. 629, 636, 541 S.E.2d 833, 836 (2001). The Court has further allowed evidence of phone calls between the victim and the defendant to show the strained nature of the parties' relationship. See State v. Williams, 321 S.C. 327, 468 S.E.2d 626 (1996). The Court has also held that evidence of previous quarrels and ill feeling between the victim and defendant arising out of a child custody controversy was admissible. See State v. Brooks, 79 S.C. 144, 60 S.E. 518 (1908). Here, the trial judge clearly ruled the Victim could testify that he was aware of threats made to him by Appellant, even going so far as

to state the belief that this situation is "exactly what" Rule 404(B) is designed to allow. R. p. 4. A finding of clear and convincing evidence is implicit in the judge's ruling, as shown by her statement to the solicitor that "if it's not a result of a conviction it has to be able to be proven by clear and convincing evidence." R. p. 2.

Appellant quotes this Court's admonition in State v. Carter, 323 S.C. 465, 476 S.E.2d 916 (Ct. App. 1996), that "in the prosecution of one crime, proof of another direct substantive crime is never admissible unless there is some legal connection between the two upon which it can be said that one tends to establish the other or some essential fact in issue." Id. at 467, 476 S.E.2d at 917. App. Br. p. 8. However, in the present case, the reference to threats was used to show intent. As such, they clearly were admissible because they tend to establish an essential fact in issue (Appellant's intent to harm Victim). Regardless, no proof, or even discussion of the text messages, was admitted, so the argument that proof of another direct substantive crime was ever presented to the jury is tenuous at best. Because South Carolina courts have granted considerable leeway with regard to testimony of prior threats to prove intent, as seen *supra*, the trial judge committed no error in allowing the reference to Appellant's prior threats, and her ruling should not be disturbed.

Appellant's argument alleges "there was no forensic person who reviewed the cell phone records and testified with any degree of certainty that Morton was the one who sent the text or even that it came from Morton's phone." App. Br. 7. However, the argument that no "forensic person" reviewed the text messages is irrelevant because the text messages were never admitted as evidence at trial, nor were they referenced as such. In fact, the jury was never even made aware that the prior threats came in the form of text

messages. The sole reference at trial to the prior threats came when the solicitor asked Victim if he was aware of any prior threats Appellant had made. After Victim responded affirmatively, the solicitor moved on to another line of questioning. The solicitor never asked Victim to specify what types of threats were made, and Victim never testified to such. Nowhere during Victim's testimony were the words "text message" uttered. Because the jury was never presented with testimony regarding the text messages, any argument regarding their authenticity is totally without merit.

Furthermore, even if the trial judge erred in admitting evidence of Appellant's prior bad acts, Appellant's conviction should be upheld because such an admission amounts to harmless error where Appellant was ultimately convicted of ABHAN, rather than attempted murder.

Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained. Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). Thus, an insubstantial error not affecting the result of the trial is harmless where "guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989). State v. Pagan, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006).

Appellant further argues "the evidence is not overwhelming and without this inadmissible prior bad act testimony, the jury most likely would have found Morton not guilty." App. Br. 7. Respondent submits this claim is without merit because overwhelming direct evidence exists to sustain Appellant's ABHAN conviction

regardless of any prior bad act testimony. A person commits the offense of assault and battery of a high and aggravated nature if the person unlawfully injures another person, and: (a) great bodily injury to another person results; or (b) the act is accomplished by means likely to produce death or great bodily injury.[1] S.C. Code Ann. § 16-3-600. Accordingly, the admission of the threats made towards the Victim was irrelevant to proving the elements of ABHAN. There is no question of the identity of the assailant. Victim testified that he gained control of his attacker and discovered Appellant's identity when he pulled off the ski mask. Furthermore, the police arrived while Appellant was still in possession of the knife which he used to repeatedly stab the Victim. Appellant claims "the victim and Morton both state that Morton did not come into the house or even attempt to charge at the victim. In fact, the victim testified that the person looked like they were going to run." App. Br. 9. However, whether Appellant ever intended to enter Victim's home is completely irrelevant and has no bearing on proving the elements in this case. Furthermore, Victim did in fact testify that after he yelled for his wife to get his gun, Appellant charged him. Thus, Appellant did run, but with a knife in his hand toward the victim, not away from the scene. Accordingly, the elements of ABHAN were clearly met by direct evidence showing Appellant maliciously stabbed the victim and used a knife to do it. As such, the admission of the so-called prior bad act testimony was harmless beyond a reasonable doubt, and the conviction should be upheld.

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[1] "Great Bodily Injury" means bodily injury which causes a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of a bodily member or organ. S.C. Code Ann. § 16-3-600.

II.

The trial court properly denied Appellant's motion for a directed verdict of acquittal on the attempted murder charge where substantial circumstantial and direct evidence existed, when viewed in the light most favorable to the state, to submit the case to the jury.

Standard of Review

In reviewing a denial of a motion for a directed verdict, an appellate court must review the evidence in the light most favorable to the State. State v. Venters, 300 S.C. 260, 264, 387 S.E.2d 270, 272 (1990). If any direct evidence or any substantial circumstantial evidence reasonably tends to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury. State v. Weston, 367 S.C. 279, 292–93, 625 S.E.2d 641, 648 (2006). State v. Jackson, 395 S.C. 250, 254, 717 S.E.2d 609, 611 (Ct. App. 2011).

Argument

Appellant argues "the Trial Court erred in refusing to grant Appellant a directed verdict of acquittal on the attempted murder charge when there was no direct evidence of malice and where the circumstantial evidence was not substantial, but rather was sufficient only to raise mere suspicion of guilt." App. Br. p. 9. Sufficient evidence of malice did exist, but the jury effectively acquitted Applicant of attempted murder by convicting him of ABHAN, which does not require malice.

When considering a motion for a directed verdict, a trial court is concerned only with the existence of evidence, not its weight. State v. Stuckey, 347 S.C. 484, 498, 556 S.E.2d 403, 410 (Ct.App.2001). Grant of a defense motion for directed verdict of acquittal is proper only "if there is a failure of competent evidence tending to prove the charge." Rule 19(a), SCRCrimP; State v. Jenkins, 278 S.C. 219, 222, 294 S.E.2d 44, 46 (1982). A trial court must submit the case to the jury if any direct or substantial circumstantial evidence has been presented that reasonably tends to prove the defendant's guilt or from which his guilt may be fairly and logically deduced. State v. Fennell, 340 S.C. 266, 270, 531 S.E.2d 512, 514 (2000). However, the trial court should grant a directed verdict motion when the evidence presented merely raises a suspicion of guilt. State v. Cherry, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004). Jackson, 395 S.C. at 254-55.

Appellant claims he should have been granted a directed verdict because the State did not present any evidence of malice. In South Carolina, a person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder. S.C. Code Ann. § 16-3-29. Malice is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong. State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998); State v. Johnson, 291 S.C. 127, 352 S.E.2d 480 (1987). It is the doing of a wrongful act intentionally and without just cause or excuse. State v. Bell, 305 S.C. 11, 406 S.E.2d 165 (1991), *cert. denied,* 502 U.S. 1038, 112 S.Ct. 888, 116 L.Ed.2d 791 (1992). Tate v. State, 351 S.C. 418, 426, 570 S.E.2d 522, 527 (2002).

In the case at bar, ample evidence was presented to the jury that, when viewed in the light most favorable to the State, tended to prove the defendant acted with malice. The fact that Appellant attacked Victim with a knife is uncontroverted. Further, multiple witnesses testified that Appellant stated he did not go to Victim's house to slash his tires, but to kill him. Appellant's brief notes that Appellant was already in handcuffs when he made the statement about coming to stab the victim; however, there is no record that a Denno[2] hearing was held to determine the voluntariness of Appellant's statement or whether Appellant was in custody. Furthermore, trial counsel never objected to the admission of Appellant's statement. Therefore, the issue is unpreserved for review. Appellant next contends the statement constituted mere puffery. The jury was free to believe it was puffery, but when the statement is viewed in the light most favorable to the State, it clearly implies malice in Appellant's actions. Appellant was caught in the act, and he still had the knife in his hand when the police arrived. Those actions, coupled with Appellant's statement of intent to kill the victim, clearly support the trial judge's denial of Appellant's directed verdict motion. Accordingly, the evidence presented did tend to prove Appellant's guilt when viewed in the light most favorable to the State, and the judge did not err by submitting the case to the jury.

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[2]Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774, 12 L.Ed.2d 908 (1964).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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July 7, 2014

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CERTIFICATE OF COUNSEL

The undersigned hereby certify that the Final Brief of Respondent complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Final Brief of Respondent*, dated July 7, 2014, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

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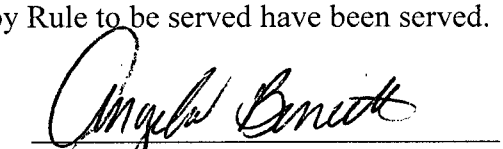
I further certified that all parties required by Rule to be served have been served. This 7th, day of July, 2014.



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