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AUG 11 2014
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Roger L. Couch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KENNETH JORDAN BELL,

APPELLANT.

APPELLATE CASE NO. 2013-001841

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. The Trial Court erred in instructing the jury that if the jury failed to reach a verdict on one of the charges against Appellant, a mistrial would be declared, the case would be retried, and the parties would "go through this whole process again;" the Trial Court erred by not clarifying that the jury's failure to reach a verdict on any one indictment would necessitate a new trial on that particular indictment, not a new trial of the entire case.

II. The Trial Court erred in excluding evidence that one of the alleged victims and a co-defendant had entered into a previous drug transaction for which the alleged victim owed the co-defendant money and that the reason the co-defendant and Appellant went to the alleged victim's apartment was to collect money for this drug debt; the evidence was relevant and admissible because (1) it was a part of the *res gestae* of the alleged crime; (2) it had bearing on the Appellant's intent in going to the alleged victim's apartment and whether Appellant had the required *mens rea* for the charges against him; and (3) it showed bias on the part of the alleged victim for which Appellant was entitled to confront him with on cross-examination. Furthermore, the probative value of this evidence was not substantially outweighed by any prejudicial effect to the State's case and to the alleged victim, especially where the Trial Court had already allowed the jury to hear that the alleged victim had previously been convicted of drug charges.

STATEMENT OF THE CASE

On March 28, 2013, Appellant Kenneth Jordan Bell was indicted by the Horry County Grand Jury for (1) first degree burglary; (2) armed robbery; (3) kidnapping; (4) possession of a weapon during the commission of a violent crime; and (5) criminal conspiracy. R.*.

Appellant was tried before the Honorable Roger L. Couch and a jury on August 12-15, 2013. Tr. 1. Appellant was represented by Gregory M. McCollum, and the State was represented by Assistant Solicitor Nancy R. Livesay. Tr. 1.

After the jury sent out two notes inquiring what would happen if the jury could not agree on one charge and what would happen if the jury was deadlocked on one charge, the Trial Court gave the jury an Allen[1] charge. Tr. 495, l. 24 – 505, l. 8; Court's Exs. 8 and 10. The jury thereafter returned with a guilty verdict on all counts. Tr. 507, l. 22 – 508, l. 16. Judge Couch sentenced Appellant to (1) fifteen years for first degree burglary; (2) ten years for armed robbery; (3) ten years for kidnapping; (4) five years for possession of a weapon during the commission of a violent crime; and (5) five years for criminal conspiracy. All sentences were to run concurrently. Tr. 523, ll. 15-24; Sentencing sheets.

Appellant timely filed and served his Notice of Appeal.

[1] Allen v. United States, 164 U.S. 492 (1896).

STATEMENT OF FACTS

On February 2, 2013, Christopher Tanner Clark was living in an apartment with two roommates, Paul Degruccio and Scott McDonald. The apartment had three bedrooms and two bathrooms and was located on the second floor. Tr. 104, l. 18 – 106, l. 1.

During the middle of the day on February 2, 2013, Clark called 911 because he heard a commotion out in the living room. He poked his head out of his bedroom and said he immediately saw two guys coming inside the apartment. One of the guys had a gun. He could not really see the other guy. He said both guys had on black hoodies and blue jeans. He could not see their faces or tell if they were white or black. Clark immediately shut his bedroom door and called 911. While he stuck his head out of his bedroom door, he never came completely out of his bedroom. Tr. 106, l. 5 – 107, l. 7; 111, l. 20 – 112, l. 1 – 11.

Clark told the 911 operator that two guys had just busted in and one had a gun. He claimed he saw the guys put the gun to his roommate's face and tell him to sit down in the chair. He then heard the guys take his roommate Paul back to Paul's bedroom and heard the guys arguing with Paul in his bedroom. Clark heard Paul continue to argue with the guys and ask why are you doing this. Tr. 107, ll. 17-25; 114, ll. 18-24. Other than that, Clark did not see anything, he just heard everything going on inside the apartment. Tr. 108, ll. 1-2.

Clark did not hang up with 911 until after he looked out his window and saw the police arrive. Tr. 108, ll. 3-7. He could see the guys walking to a red Mitsubishi, and he observed police ordering them to the ground and arresting them. Tr. 120, ll. 3-14. Clark's 911 call was played for the jury. Tr. 110, ll. 5-6.

Clark described who was present in the apartment on February 2, 2013. Erik Meijer was in the living room playing video games on his computer. Paul was in his bedroom, and Scott was in his bedroom asleep. Clark was in his bedroom at the time too. They were all playing video games. Clark, Paul, and Scott all lived in the apartment, but Erik did not. Tr. 110, ll. 16 – 2; 126, ll. 15-16.

On cross-examination, Clark admitted that no one threatened him that day or pointed a gun at him. He also testified that no one took any property from him even though he owned valuables such as a flat screen television, a computer, and an Android smart phone. Tr. 122, l. 23 – 123, l. 17. He acknowledged that during the incident no one attempted to come into his bedroom or even tried to jiggle the door handle. Tr. 124, ll. 4-9.

Clark confirmed that his roommate Scott was asleep through the whole entire incident and had to be woken up after the two guys were arrested. Tr. 124, l. 10 – 125, l. 14. He also reiterated that Erik Meijer was in the living room during the entire incident and that to his knowledge, no one took anything from Erik. Tr. 125, l. 17 – 126, l. 11.

Clark further confirmed that the incident took place during the middle of the afternoon while the sun was shining. He said the apartment was "pretty well lit" during the daytime. Tr. 128, ll. 3-15.

Clark also testified that when he saw the two individuals come into the apartment, his roommate Paul was at the time looking out the window of the foyer area. Tr. 129, l. 1 – 14. Clark testified that since the incident, he learned that Paul owned money to Christopher Bell, one of the two men who entered the apartment that day. Clark said that Paul was the only one who owned Christopher Bell any money – not Clark, Scott or Erik. Tr. 135, ll. 2 –

14. Clark said that after the incident, Paul told him his laptop and a digital camera were taken from him. Tr. 135, l. 15 – 136, l. 2.

Clark heard Paul arguing with one of the individuals who entered the apartment. He heard Paul arguing back to one of the individuals. It sounded like Paul was mad and upset that the incident was taking place. Tr. 136, ll. 3 – 25.

Paul Degruccio testified that February 2, 2013 started off kind of like a normal day. He received a telephone call from a female identifying herself as Jasmine, a friend of Paul's. Based on this telephone call, he expected Jasmine to come over to his apartment. Tr. 142, ll. 12 – 143, l. 17; 144, ll. 2-11. Paul said he felt a little fishy about the situation because he was not too close to Jasmine and she was being really friendly. Erik convinced Paul that he should hang out with Jasmine because Paul had been cooped up in the house too much. Tr. 144, ll. 14-23.

Paul texted Jasmine the directions to his apartment. He waited for Jasmine to arrive at his apartment. He then received a text that she was at the apartment, so he went and cracked the door and was looking out the window into the parking lot for someone. He said he did not see anyone until the door was busted open and there were two individuals behind him, one with a tire iron and one with a gun. Tr. 145, ll. 3 – 22.

Paul said he did not remember what the individuals were wearing, but claimed both were wearing masks and one had a gun and one had a tire iron. Tr. 147, l. 6- 148, l. 2. He said the individual with the tire iron told him to "give me all your shit." When Paul heard the voice, he recognized it as Christopher Bell's voice. At that point Christopher Bell took off his mask, and Paul knew him as Christopher Bell. Tr. 148, ll. 3 - 19. Paul testified that

Christopher Bell was holding the tire iron and the other guy was holding the gun. Tr. 148, ll. 20-24.

Paul claimed Appellant pointed the gun at him several times. Tr. 149, ll. 4-6. Paul said Erik was also in the living room sitting on the couch when this happened and Erik just stayed there. Tr. 149, ll. 10-16.

Paul said that after Christopher Bell took his mask off, Christopher Bell first kind of pushed him into the chair and then Christopher Bell took Paul into his bedroom basically telling Paul that he was going to give Christopher Bell whatever he had. Tr. 149, ll. 17-24. Paul claimed the other individual with the gun, who was still masked at the time, stood in the living room with his gun trained on Erik so that Erik could not leave. Tr. 149, l. 25 – 150, l. 2.

Paul testified that he and Christopher Bell went into his bedroom and Christopher was rummaging through Paul's stuff and throwing Paul's things around. Paul was upset about the situation, particularly due to his past history with Christopher Bell. Paul was talking to Christopher Bell. Paul said he owed Christopher Bell money for something and that the two had talked a couple of months back about the money owed. Tr. 150, ll. 5-11.

While Paul was arguing with Christopher Bell about their past, the other individual with the gun allegedly came into Paul's bedroom, stuck the gun in Paul's face and told him to sit down. Tr. 150, ll. 14-25. Christopher Bell began asking Paul where his computer stuff was, and Paul said he gave Christopher Bell his laptop and camera. Paul testified that the two individuals then rushed out of the apartment with his laptop and camera. Tr. 152, l. 19 – 153, l. 2.

With respect to the money that Paul owed Christopher Bell, he said that before February 2, 2013, the last time he discussed owing money to Christopher Bell was two to three months prior when Paul ran into him at the Food Lion. Paul walked up to Christopher and apologized for what had happened and said he just did not have the money to pay Christopher back. He said that Christopher did not threaten him or act hostile toward him at that time. Tr. 155, ll. 5-25; 158, l. 22 – 159, l. 1. Christopher did tell him at the time that he would like the money. Tr. 156, ll. 24-25. Paul testified that he had known Christopher Bell for a couple of years. Tr. 157, ll. 3-4.

On cross-examination, Paul admitted that he owed Christopher Bell around $800. Tr. 172, ll. 3-11. Paul also admitted that he had a felony conviction, and the Trial Court allowed the jury to hear that Paul had been previously convicted for possession of marijuana with intent to distribute. Tr. 172, ll. 12-14; 19, l. 25-197, l. 7.

What the Trial Court did not let the jury hear was that when Paul was arrested and charged with possession with intent to distribute marijuana, the drugs that Paul was arrested for were given to him by Christopher Bell. Tr. 189, l. 14 – 190, l. 1. Those drugs were the reason why Paul owned Christopher Bell money and why Christopher Bell came to Paul's apartment that day to collect the money. Tr. 190, ll. 1-4. Paul had paid Christopher $800 for a half of a quarter-pound of marijuana but still owed Christopher a remaining $800. Therefore, Paul had only paid Christopher half of what was owed for the drugs. Paul was unable to pay the remaining $800 because he was arrested and the police seized the marijuana. Tr. 190, l. 3 – 191, l. 12. While the Trial Court believed this testimony could be relevant to the charges for which Appellant was on trial, the Trial Court would not allow the jury to hear this proffered testimony of Paul. Tr. 194, l. 11 – 196, l. 2.

On cross-examination, Paul again admitted to having a heated discussion with Christopher Bell during the incident. He agreed that Christopher and Appellant had no words or heated discussions with the other individuals in the apartment – Clark, Erik, and Scott. Tr. 198, l. 12 – 199, l. 23. Paul also agreed that only his property was taken and no one took any property of Clark, Erik, or Scott. Tr. 199, l. 24 – 200, l. 12; 230, ll. 13-15. Paul received no physical injuries during the incident. Tr. 200, ll. 15-16.

Erik Meijer testified that he was at Paul's apartment the day of the incident and occasionally stayed the night there every once in a while even though he did not live there. Tr. 233, ll. 7-12. On the day of the incident, he was hanging out with Paul in Paul's bedroom when Paul received a text from the girl that was supposed to be coming over to the apartment. Paul then ushered Erik out of the bedroom and into the living room. Erik was just sitting in the living room. Erik said Paul unlocked the front door and lightly cracked it and was looking out the front window when out of the blue two people busted through the door wearing masks, one with a gun and one with a tire iron. Tr. 233, ll. 13 – 23.

Erik said he noticed the black masks and the silver of the gun but did not pay too much detail to what the individuals were wearing. Tr. 234, ll. 16 – 23. He said the gun was mainly pointed at Paul, although Erik testified that the gun made a quick pass by him. Tr. 234, l. 24 – 235, l. 4. Erik testified that the individuals at first had Paul sit down in a chair and then after Paul identified Christopher Bell, Christopher took his mask off and led Paul back to Paul's bedroom while Appellant stayed where he could look down the hallway and watch Erik at the same time. Tr. 235, ll. 5 – 10. Erik testified that while Appellant was standing in the hallway, most of the time he just had his arms crossed and was not

pointing the gun at Erik but just watching him. Tr. 236, ll. 4 – 8. Erik never left the living room and saw the two individuals walk out the front door. Tr. 238, ll. 2 – 6.

Erik testified on cross-examination that he had his own laptop with him at the apartment on the day of the incident that was worth about $1300 but no one took it or any other valuables from him that day. Tr. 243, l. 15 – 244, l. 24. It was Christopher Bell who walked out of the apartment with Paul's laptop and camera. Tr. 246, ll. 8 – 15. Erik was not physically harmed during the incident. Tr. 246, ll. 16-17. Scott never woke up during the incident and that no one tried to enter Scott's room. Tr. 246, ll. 18-25. Erik agreed that the only person who had property taken was Paul. Tr. 247, ll. 1-3.

Officer Natalie Boyd of the Horry County Police Department was dispatched to the scene where she saw two subjects in black hoodies, blue jeans and socks over their shoes, one about to enter the driver's door of the red-colored vehicle and one about to enter the back passenger door. She ordered the subjects to the ground and also observed a female passenger already seated in the front passenger seat of the vehicle. All three subjects were placed in handcuffs. Tr. 247, l. 17 – 253, l. 8. Officer Boyd identified Christopher Bell as the subject about to get in the driver's seat and identified Appellant as the individual about to get in the back passenger seat. The female in the front passenger seat was Tonie Pasquale. Officer Boyd said there was not a girl named Jasmine in the vehicle. Tr. 256, l. 11 – 257, l. 22.

Officer Boyd located a laptop and camera, as well as a black tire iron. She determined the laptop and camera belonged to Paul. Tr. 259, l. 20 – 260, l. 17. The tire iron was found under the front wheel of the vehicle by the driver's door. Tr. 275, l. 23 – 276, l. 4. A gun was found in the back floorboard area of the vehicle. Tr. 276, ll. 5-13. A

.45 bullet was found in Appellant's left pocket. Tr. 276, ll. 14 – 18; 278, l. 12 – 279, l. 2. The gun was a .45 caliber. Tr. 279, ll. 3-6. Officer Boyd agreed that Appellant complied with her demands. Tr. 289, ll. 8-16.

Officer Timothy Cast of the Horry County Police Department testified that there were four rounds in the magazine of the gun and one live round in the chamber. Tr. 294, ll. 15-18; 304, ll. 21-25. When one round is in the chamber, the gun is ready to shoot and no extra steps have to be taken to fire the gun. Tr. 305, ll. 1 – 24. Officer Cast also admitted though that one way to unload a gun would be to move rounds into the chamber and take the bullets out of the chamber until the gun was completely empty. If someone was not finished unloading a gun this way, there could possibly be a round left in the chamber. Tr. 320, l. 18 - 323, l. 2. Therefore, just finding a round in the chamber of the gun would not necessarily mean that someone had a round in the chamber with the intent to shoot.

Appellant's mother testified that Appellant and his brother Christopher Bell were half-brothers who shared the same father. Tr. 347, ll. 5-8. She raised Appellant in Pittsburgh where he was a straight A student in high school and captain of the football and baseball teams. Tr. 345, ll. 19-22; 347, l. 17 – 348, l. 7. Appellant enlisted in the Air Force but a medical condition with his liver caused him not to complete basic training. He was eligible to re-enlist after the medical condition cleared. Tr. 350, l. 20 – 351, l. 21. Appellant eventually moved down to Horry County to live with another brother, but ended up associating with his half-brother Christopher. Tr. 353, l. 24 – 354, l. 11. Appellant's mother described Appellant as a very loyal person who was very protective of his family. Tr. 355, l. 19 – 356, l. 3.

Appellant's brother Buddy Bell testified Christopher Bell told Buddy that he, Christopher, had given Appellant the gun. Tr. 380, ll. 2 – 17.

After the case was given to the jury, the jury struggled with their verdict, twice sending notes to the trial judge inquiring what would happen if the jury could not agree on one charge and what would happen if the jury was deadlocked on one charge. Tr. 495, l. 24 – 496, l. 2; 503, ll. 7-10; Court Exs. 8 and 10. The jury eventually convicted Appellant on all charged counts. Tr. 507, l. 22 – 508, l. 16.

ARGUMENT

I. The Trial Court erred in instructing the jury that if the jury failed to reach a verdict on one of the charges against Appellant, a mistrial would be declared, the case would be retried, and the parties would "go through this whole process again;" the Trial Court erred by not clarifying that the jury's failure to reach a verdict on any one indictment would necessitate a new trial on that particular indictment, not a new trial of the entire case.

During its deliberations, the jury twice sent out notes to the Trial Court indicating that it was deadlocked on at least one of the charges:

> What happens if there is one charge that the jury cannot agree on?

Tr. 495, l. 24 – 496, l. 2; Court's Ex. 8.

> What happens if we are deadlock [sic] on one charge?

Tr. 503, ll. 7-10; Court's Ex. 10 (emphasis in original).

After the jury's second question, the Trial Court gave an Allen charge to the jury. Tr. 503, l. 11 – 505, l. 8. As a part of this charge, the Trial Court instructed the jury as follows:

> ***If you do not agree on a verdict in this case, on one of the charges in that case, it would be my duty to declare what is referred to as a mistrial.*** In that case, it does not mean that anybody wins; it just means that at some point in the future time either ***I or some other judge will try this case*** with some other jury sitting where you now sit. The same participants will come, perhaps the same lawyers will ask basically the same questions and get basically the same answers and we will then ***go through this whole process again***.
>
> Now, you were selected in the same manner and from the same source as any future jury in this case would be chosen and there's no reason for me to believe or suppose that the case will ever be submitted to twelve more intelligent or impartial or conscientious or competent jurors than you, or that any more clearer evidence will be produced by one side or the other. So, what I'm going to ask you to do is to return to your deliberations. Consider what I've just said to you and again re-examine the positions in light of my charge in this matter. So, I'm gonna ask you to return to the jury room and continue your deliberations.

Tr. 504, l. 14 – 505, l. 8 (emphasis added).

At the conclusion of the Allen charge, Appellant's counsel raised the issue that since Appellant was subject to multiple indictments, he would only be tried again on any indictment for which the jury could not reach a verdict. The Allen charge suggested to the jury that the entire case would have to be retried if the jury could not reach a verdict on one indictment. The Trial Court decided not to make any changes to the Allen charge, stating that he had already informed the jury at the beginning of its deliberations that that they were to weigh the evidence and decide each offense separately. Tr. 505, l. 15 – 507, l. 1.

While the Trial Court may have instructed the jury at one point during the trial that the jury was to decide each indictment separately and distinct from the decision it makes on every other indictment, the Trial Court, in its Allen charge to the jury, did not correctly answer the question posed by the jury: "What happens if we are deadlock [sic] on one charge? Tr. 503, ll. 7-10; Court's Ex. 10 (emphasis in original); see also State v. Patrick, 289 S.C. 301, 308, 345 S.E.2d 481, 485 (1986), *overruled on other grounds by*, Casey v. State, 305 S.C. 445, 409 S.E.2d 391 (1991) and Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999) ("Merely superimposing a correct statement of law over an erroneous charge only fosters prejudice and confusion.").

The Trial Court's Allen charge informed the jury that if it were deadlocked on one charge, the Trial Court would have to declare a mistrial and that "this case" would have to be tried at a future time before the same or some other judge with the same participants and perhaps the same lawyers. The Trial Court told the jury: "[W]e will then go through ***this whole process again***." Tr. 504, ll. 14-22 (emphasis added).

The Trial Court's charge to the jury that "this case" would have to be retried and the parties would have to go through "the whole process again" if the jury remained deadlocked on just one charge was an incorrect statement of the law. In Pauling v. State, 350 S.C. 278, 565 S.E.2d 769 (2002), a deadlocked jury submitted a written question asking the trial judge whether the guilty verdicts would stand on the other six charges should a unanimous decision not be reached on the two counts of murder or would the whole case be retried. After the jury returned to the courtroom, the trial judge instructed: "... you gave me a question. If you do not reach a verdict on the two counts, it would be a mistrial. The whole case would have to be tried over." After returning to deliberations, the jury returned its verdict acquitting the petitioner of one murder charge and convicting him on the remaining seven charges, including the other murder charge. Id. at 283, 565 S.E.2d at 771.

The Supreme Court has held the jury's failure to reach a verdict on any count in the indictment would necessitate a new trial on the particular count, not a new trial of the entire case. Id. at 284, 565 S.E.2d at 772 (citing State v. Pauling, 322 S.C. 95, 470 S.E.2d 106 (1996) and State v. Kornahrens, 290 S.C. 281, 350 S.E.2d 180 (1986)). In Pauling, the trial judge instructed the jury to the contrary-that failure to reach a verdict on the murder charges would require a new trial of the entire case. Because the trial judge's response was clearly erroneous, Pauling's trial counsel was deficient in failing to object to the trial judge's charge and petitioner was entitled to the grant of post-conviction relief and a new trial. Pauling, 350 S.C. at 284-85, 565 S.E.2d at 772-73.

The Trial Court's instruction to the jury in this case that its failure to reach a verdict on one charge would require the parties to go through the whole process again was in direct contradiction to the Supreme Court's holding in Pauling. After Appellant's counsel raised

the issue of whether the charge was confusing, the Trial Court should have corrected its Allen charge to inform the jury that its failure to reach a verdict on one indictment would not necessitate a new trial of the entire case. The jury was instead left with the impression that if it could not reach a verdict on one charge, all five charges would have to be retried. The jury then reached a guilty verdict on all five charges about three hours after the Trial Court's Allen charge. Tr. 503, l. 4 – 508, l. 16.

Appellant is entitled to a new trial where the Trial Court erroneously instructed the jury that the case would be retried and the parties would go through the whole process again if the jury was deadlocked on one charge without clarifying that a retrial would be required only on the indictment as to which the jury could not reach a verdict.

II. The Trial Court erred in excluding evidence that one of the alleged victims and a co-defendant had entered into a previous drug transaction for which the alleged victim owed the co-defendant money and that the reason the co-defendant and Appellant went to the alleged victim's apartment was to collect money for this drug debt; the evidence was relevant and admissible because (1) it was a part of the *res gestae* of the alleged crime; (2) it had bearing on the Appellant's intent in going to the alleged victim's apartment and whether Appellant had the required *mens rea* for the charges against him; and (3) it showed bias on the part of the alleged victim for which Appellant was entitled to confront him with on cross-examination. Furthermore, the probative value of this evidence was not substantially outweighed by any prejudicial effect to the State's case and to the alleged victim, especially where the Trial Court had already allowed the jury to hear that the alleged victim had previously been convicted of drug charges.

During pre-trial motions, the State made a motion *in limine* to exclude any evidence that Paul Degruccio had been arrested and convicted for the possession with the intent to distribute marijuana and that Paul had purchased this marijuana that was the subject of the arrest and conviction from Christopher Bell. The State furthermore wanted excluded as evidence from trial the fact that Paul owned a large amount of money to Christopher Bell for that particular marijuana and that the reason Christopher Bell and Appellant went over to Paul's apartment the day of the incident was to collect on the money Paul owned for the marijuana Christopher Bell had given to him. The State argued that this evidence was irrelevant to the incident that occurred at Paul's apartment and to the charges against Appellant arising out of that incident. Tr. 34, ll. 2 – 36, l. 1.

Appellant's counsel argued that the evidence of the drug transaction between Paul and Christopher Bell was relevant and was part of the *res gestae* of the alleged crime and was evidence of bias on the part of Paul as a witness and evidence of Appellant's intent in going to the apartment:

> [I]n this particular case, I would submit that the fact that the Co-defendant, Christopher Bell, participated in drug transactions with . . . Paul Degruccio . .

> . was the purpose for Christopher Bell in taking others to go to the apartment to get his money that was owed to him or, or settle the debt or something of that nature. So we would submit the fact that I think the evidence would establish that Mr. Christopher Bell and Mr. Paul Degruccio had transacted illegal drug transactions in the past. There was a debt owed by Mr. Degruccio . . . to the Co-defendant Christopher Bell and that was the reason, along with other factors, why Mr. Christopher Bell went to the apartment in the first place and then took his brother [Appellant] with him. I would submit there are several factors here. One is that the - - we're talking about cross-examination here, is the way I see this coming up. ***Kenneth Bell has the right - - obviously under the right to confront witnesses, has the right to a full and complete confrontation of the witnesses. It can go to the bias of the witness. It can go to the reason for being there and ultimately, could go to the res gestae or the purpose of the crime.*** Now, there are situations where drug use has been exclud[ed] to protect the Defendant or the person on trial, but even those situations it's been allowed if it were determined to [be] part of the crime or, as the Court usually uses the term, res gestae. So we could submit under those reasons if Mr. Paul Degruccio testifies that that would be a proper subject for cross-examination . . . .

Tr. 36, l. 18 – 37, l. 20 (emphasis added).

The State argued in response that the prejudicial effect of such testimony would outweigh any probative value of the evidence, and the Trial Court stated that he tended to agree with the State. Tr. 39, ll. 12 – 21. The Trial Court, however, recognized that Appellant had the right to confront witnesses and present whatever defense he had. Tr. 39, ll. 21-23. The Trial Court then stated that he had to decide whether the prejudicial effect of the testimony outweighed its probative value. Tr. 40, ll. 12-14. Appellant's counsel again argued that the evidence was relevant and went to the intent of Appellant in going to Paul's apartment on the day of the incident in terms of the burglary and armed robbery charges against him. Tr. 41, ll. 11-14; ll. 22-25. Appellant's counsel further argued that it was not unduly prejudicial to the State's case to "to prove the truth of what happened in the case as part of the reasoning of the case and the res gestae and the true facts of the case . . . ." Tr. 42, ll. 1-5.

The Trial Court then ruled that it would allow Appellant to show evidence that the intent of going over to the apartment was to collect a debt, but the Trial Court would not allow Appellant to characterize the debt as a drug debt stemming from a drug transaction, finding the prejudicial effect of that evidence would outweigh the probative value of the evidence. Tr. 42, ll. 6-18.

During Appellant's cross-examination of Paul Degruccio, Appellant elicited the following testimony from him as proffer of his cross-examination of Paul. When Paul was arrested and charged with possession with intent to distribute marijuana, the drugs that Paul was arrested for were given to him by Christopher Bell. Tr. 189, l. 14 – 190, l. 1. Those drugs were the reason why Paul owned Christopher Bell money and why Christopher Bell came to Paul's apartment that day to collect the money. Tr. 190, ll. 1-4. Paul had paid Christopher $800 for a half of a quarter-pound of marijuana but still owed Christopher a remaining $800. Therefore, Paul had only paid Christopher half of what was owed for the drugs. Paul was unable to pay the remaining $800 because he was arrested and the police seized the marijuana. Tr. 190, l. 3 – 191, l. 12.

Appellant's counsel again argued to the Trial Court that this evidence should be heard by the jury:

> I think it's part of the crime, the body of the crime, the res gestae . . . . I think it explains the, the motive of Christopher Bell. Now Kenneth Bell, for the reasons that we'll get into, felt the need to, to protect or, or, or safeguard his brother, whether that's effective in this case or not, but that's ultimately where we're going with this. I would submit that that has relevance for those reasons. There are these prior dealings with each other and there's been evidence that no one else in terms of robbery and a theft, no one else was, was - - and I understand the legal part of it. He was the target, if you will, of the actions of Christopher Bell in the alleged actions of Kenneth Bell. So I think it's relevant . . . .

Tr. 193, l. 14 – 194, l. 2.

The Trial Court said the issue was not relevance because he agreed the evidence could be relevant but the issue was whether or not its prejudicial effect outweighed the probative value of the evidence. Tr. 194, l. 3 – 12. Appellant's counsel argued that the probative value of the evidence did outweigh any prejudicial effect to the State because the evidence went to intent and the bias of the State's witness in testifying against Appellant:

> I think it goes to the intent on behalf of at least the Co-defendant and may be separate intent regarding [Appellant] here on trial. Obviously, Your Honor, I think I should be allowed to go into it. Okay. I think it is not unduly prejudicial. Most cases that deal with prejudice are, are the Court's taking care not to unduly prejudice the Defendant so that he receives due process and receives a fair trial. As I understand the role of our system and the advocate, the role that I have, is I am supposed to question the, the bias and the ability of the witness to be truthful or, or any, any way, shape or form . . .

Tr. 194, ll. 13-24.

While the Trial Court ruled that Appellant would be allowed to ask Paul Degruccio whether he had been convicted of possession with intent to distribute marijuana, the Trial Court ruled that Appellant would not be allowed to ask about the extrinsic facts and circumstances of that conviction, including the testimony of Paul in the proffered cross-examination regarding the fact that the drugs that were the subject of his arrest and conviction were given to him by Christopher Bell and that he still owed Christopher Bell $800 for those drugs and that the reason Christopher Bell and Appellant came to his apartment that day was to collect this money owed. Tr. 195, l. 25 – 197, l. 7.

The Trial Court erred in not allowing Appellant to introduce this evidence where the evidence was highly probative as it was a part of the *res gestae* of the alleged crime and explained the story of why Appellant ended up at Paul's apartment. The evidence went to

the element of intent and whether Appellant went to Paul's apartment with intent to commit a crime therein. Appellant also had a Sixth Amendment right to cross-examine Paul concerning bias under the Confrontation Clause, and this evidence was relevant to the bias of Paul. The probative value of this evidence outweighed any prejudicial effect to the State or to Paul as witness, especially where the Trial Court allowed the jury to hear that Paul had been previously convicted of possession with intent to distribute marijuana. The Trial Court therefore clearly abused its discretion in excluding this evidence.

First, the evidence was probative and admissible because it was part of the *res gestae* of the incident. There is no doubt that if the State had wanted this evidence admitted as a part of the *res gestae* of the crime that it would have been permitted by the Trial Court. The evidence in the record establishes a relationship between the drug transaction between Paul Degruccio and Christopher Bell and the reason why Christopher Bell and Appellant went to Paul's apartment. Therefore, there is a logical relevance between Paul and Christopher's drug transaction and the alleged crimes. In State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996), *overruled on other grounds by* State v. Giles, 407 S.C. 14, 754 S.E.2d 261 (2014), our Supreme Court quoted United States v. Masters, 622 F.2d 83, 86 (4th Cir. 1980) to describe the admission of evidence where it is a part of the *res gestae* of the crime:

> One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence "furnishes part of the context of the crime" or is necessary to a "full presentation" of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its "environment" that its proof is appropriate in order "to complete the story of the crime on trial by proving its immediate context or the 'res gestae' " or the "uncharged offense is 'so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other

> ...' [and is thus] part of the res gestae of the crime charged." And where evidence is admissible to provide this "full presentation" of the offense, "[t]here is no reason to fragmentize the event under inquiry" by suppressing parts of the "res gestae."

Adams, 322 S.C. at 122, 470 S.E.2d at 370-71.

In this case, the drug transactions between Paul and Christopher Bell were inextricably intertwined with the crimes with which Appellant was charged and furnished the context and the reason why Appellant went to Paul's apartment with his half-brother Christopher Bell. The evidence was necessary to provide a complete story or explanation of the pending offenses against Appellant. This evidence therefore was admissible and probative as a part of the *res gestae* of the crime. See Adams, 322 S.C. at 117-22, 470 S.E.2d at 368-71 (holding evidence of defendant's drug use prior to charged crimes was admissible to show motive and as part of the *res gestae*); see also State v. Williams, 321 S.C. 455, 460-63, 469 S.E.2d 49, 52-54 (1996) (holding witness' testimony concerning murder defendant's motive, that victim may have stolen defendant's crack cocaine, was admissible as part of the *res gestae*).

Second, the evidence was probative as to the intent and motive of Appellant in going with Christopher Bell to Paul's apartment. An element of first degree burglary is that a person "enters a dwelling without consent and with the intent to commit a crime in the dwelling." S.C. CODE ANN. § 16-11-311(A). If Appellant did not have intent to commit any crime in Paul's apartment when he went inside because he thought he was just going inside with his brother to collect money owed by Paul to Christopher and thought he might end up needing to protect Christopher since the collection of a drug debt could possibly turn into a bad situation, then Appellant would not necessarily have had intent to commit a crime

in the apartment when he first entered it. The jury was entitled to hear this information to make an informed decision on Appellant's intent in entering the apartment.

This evidence would have also been evidence concerning the *mens rea* required for the charged offenses against Appellant. "Criminal liability is normally based upon the concurrence of two factors, an evil meaning mind [and] an evil doing hand." United States. Bailey, 444 U.S. 394, 402 (1980) (internal citations omitted). The jury was also entitled to hear this evidence to determine whether Appellant had the required *mens rea* for the crimes charged against him when he went to the apartment of Paul that day.

Finally, the evidence excluded by the Trial Court was admissible to show the bias of Paul and whether his account of the events that occurred in his bedroom was accurate, especially given that he was the only witness at trial that knew what occurred in his bedroom between him, Christopher Bell, and Appellant as the other three individuals in the apartment did not see what happened in Paul's bedroom.

"The Sixth Amendment rights to notice, confrontation, and compulsory process guarantee that a criminal charge may be answered through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence." State v. Mizzell, 349 S.C. 326, 330, 563 S.E.2d 315, 317 (2002) (quoting State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994)). The Sixth Amendment is applicable to the states through the Fourteenth Amendment. See Pointer v. Texas, 380 U.S. 400 (1965).

"A defendant has the right to cross-examine a witness concerning bias under the Confrontation Clause." Mizzell, 349 S.C. at 331, 563 S.E.2d at 317 (citing Davis v. Alaska, 415 U.S. 308 (1974) and State v. Brown, 303 S.C. 169, 399 S.E.2d 593 (1991)). "On cross-

examination, any fact may be elicited which tends to show interest, bias, or partiality of the witness." Mizzell, 349 S.C. at 331, 563 S.E.2d at 317 (internal citations omitted); see Rule 608(c), SCRE ("Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.").

Paul himself was involved in drug dealings and drug transactions with Christopher Bell, knew he owed money to Christopher Bell relating to these transactions, and had a motivation to be less than truthful at trial to protect himself from his own involvement in drug activity. Appellant should have been allowed to confront Paul about his bias in his testimony against Appellant about the events occurring that day at his apartment and in his bedroom. By excluding this evidence, the Trial Court erroneously limited Appellant's ability to show a prototypical form of bias on the part of the witness and thereby expose to the jury the facts from which a juror could appropriately draw inferences relating to the reliability of the witness. See Mizzell, 349 S.C. at 331, 349 S.E.2d at 317.

The Trial Court, while agreeing that the evidence was relevant, excluded the evidence of the drug transaction between Paul and Christopher Bell and the real reason why Christopher Bell and Appellant went to Paul's apartment, finding that its prejudicial effect outweighed its probative value. As explained above, the evidence was highly probative to Appellant's defense. Furthermore, relevant evidence should only be excluded "if its probative value is ***substantially outweighed by the danger of unfair prejudice*** . . . ." Rule 403, SCRE (emphasis added).

The Trial Court in this case did not find that the probative value of the evidence was "***substantially outweighed***" by the prejudicial effect of the evidence as required by Rule 403, only that the prejudicial effect outweighed the probative value of the evidence.

Tr. 42, ll. 14-18. The standard is "***substantially outweighed***," and the Trial Court did not follow this standard.

Second, the prejudice must be "***unfair prejudice***," not just any prejudice. The jury already heard that Paul had a previous conviction for possession with intent to distribute marijuana, so there was really no additional prejudice caused to the State's case or to Paul by the proffered evidence Appellant wanted admitted. Tr. 196, l. 25 – 197, l. 7.

There is also no unfair prejudice to the State's case or to Paul where the evidence Appellant sought to have admitted was a true account of the full reason why Appellant and Christopher Bell went to Paul's apartment. Just because evidence may be prejudicial to the State's case or hurt the State's case does not mean that the evidence was ***unfairly prejudicial*** evidence which would cause a jury to decide the case on an improper basis.

"Unfair prejudice means an undue tendency to suggest decision on an improper basis." State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176. (2009). "Unfair prejudice does not mean the damage to a defendant's [or State's] case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis."\State v. Dennis, 402 S.C. 627, 636, 742 S.E.2d 21, 26 (Ct. App. 2013) (internal citation omitted). "Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one." State v. Cheeseboro, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001). "All evidence is meant to be prejudicial; it is only *unfair* prejudice which must be scrutinized under Rule 403." State v. Collins, 398 S.C. 197, 207, 727 S.E.2d 751, 757 (Ct. App.2012) (brackets and internal quotation marks omitted), *cert. granted* August 8, 2013.

The Trial Court accordingly clearly abused its discretion in excluding the evidence of the drug transaction between Paul and Christopher Bell and that being the reason why Christopher Bell and Appellant went to Paul's apartment on the day of the incident because the Trial Court believed its prejudicial effect outweighed its probative value. Appellant is therefore entitled to a new trial.

CONCLUSION

For the reasons set forth herein, Appellant Kenneth Jordan Bell respectfully requests this Court to reverse his convictions and remand the case for a new trial.

Respectfully submitted,

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

This 11th day of August, 2014.