STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Horry County

Steven H. John, Circuit Court Judge

TOMMY TOOMER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000649

SUPPLEMENTAL APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Tommy Toomer, Appellant.

Appellate Case No. 2009-129146

Appeal From Horry County
Edward B. Cottingham, Circuit Court Judge

Unpublished Opinion No. 2012-UP-439
Heard June 6, 2012 – Filed July 18, 2012

AFFIRMED

Chief Appellate Defender Robert M. Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Brendan Jackson McDonald, all of Columbia, and Solicitor J. Gregory Hembree, of Conway, for Respondent.

PER CURIAM: Tommy Toomer appeals his murder conviction. The incident giving rise to the charge against him occurred at his residence. The two issues he raises on appeal concern the testimony of his housemate, Wanda Garrett, who appeared as a witness for the State. We affirm.

1. Toomer first argues the trial judge erred in admitting testimony from Garrett that on previous occasions he grabbed a heavy tree limb from a bedroom window and hit her with it. We hold Toomer failed to take adequate measures to preserve this issue for appeal. The record shows only that Toomer objected to the testimony under Rule 404(b), SCRE. The trial judge then held a bench conference that the jurors, though not excused from the courtroom, were unable to hear. The trial judge announced immediately after the bench conference that he permitted the disputed testimony; however, there is no explanation as to why the trial judge ruled as he did. In its respondent's brief, the State has suggested several grounds to support the admission of this statement, including (1) that it was probative of Toomer's intent, (2) that it demonstrated the absence of mistake or accident, and (3) that it was admissible pursuant to a *res gestae* theory. Without any information as to why the trial judge admitted Garrett's testimony about Toomer's alleged prior bad act, we cannot determine whether the ruling was in error. *See State v. Hutto*, 279 S.C. 131, 132, 303 S.E.2d 90, 91 (1983) (finding no error because the appellant did not meet his burden of presenting a record that was sufficiently complete for appellate review of the trial judge's actions); *In re Richard D*, 388 S.C. 95, 100, 693 S.E.2d 447, 450 (Ct. App. 2010) (acknowledging that an issue on appeal may have been discussed during an off-the-record bench conference but holding this court "cannot review issues not contained in the record").

2. Toomer also contends the trial judge erred in allowing the State to have a portion of a tape-recorded statement that Garrett gave to the police played during her redirect examination. Garrett gave the tape-recorded statement to the police a few days after the incident from which the charge against Toomer arose. In this statement, Garrett said that Toomer left their residence to purchase drugs shortly before he fatally injured the victim; however, she did not attest to this fact in either of two written statements she provided to law enforcement that same day. The question before us is whether the statement was admissible as a prior consistent statement under Rule 801(d), SCRE. We hold the trial judge properly allowed the jury to hear a portion of the tape.

Under Rule 801(d)(1)(B), SCRE, a prior statement is not hearsay if (1) the declarant testifies at trial and is subject to cross-examination concerning the

statement and (2) the statement is consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, provided that the statement was made before the alleged fabrication or before the alleged improper influence or motive arose.

When cross-examining Garrett, Toomer asked her numerous questions that evidenced an attempt not only to discredit her veracity but also to suggest she altered her version of the events to include an assertion that he left their residence to purchase drugs before he killed the victim. First, Toomer asked Garrett why he would have to leave the residence, which she described as a "crack house," to buy drugs. When Garrett explained that the crack sold at the residence was adulterated with other substances, Toomer retorted, "You didn't tell the police that when you gave them a written statement on May 21st, did you?" Toomer also attempted to impeach Garrett with one of her written statements, noting that in the statement she said only that "[Toomer] left for a while . . . and we didn't know where he went to" and then pointing out that "*today* you're telling this jury he left to buy crack." (emphasis added). When cross-examining Garrett, Toomer further sought to emphasize the absence in her written statements of any mention that he left to purchase drugs by asking, "Suffice it to say you did not say in your written statement that Mr. Toomer went to get crack, did you?" The trial judge's decision to allow the State to have a portion of Garrett's tape-recorded statement played was therefore amply supported by the record. *See State v. Banda*, 371 S.C. 245, 251, 639 S.E.2d 36, 39 (2006) (stating an appellate court is bound by the trial judge's preliminary factual findings in determining the admissibility of certain evidence in criminal cases unless the findings are clearly erroneous).

AFFIRMED.

WILLIAMS, THOMAS, and LOCKEMY, JJ., concur.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Edward B. Cottingham, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TOMMY TOOMER,

APPELLANT

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the court erred by allowing Wanda Garrett to testify appellant had grabbed a stick out of the bedroom in anger to hit her in the past since this was impermissible propensity evidence under Rule 404(b), SCRE?

2.

Whether the court erred by playing Wanda Garrett's statement to the police since it constituted an impermissible prior consistent statement and appellant had not alleged recent fabrication on Garrett's part as the solicitor asserted?

STATEMENT OF THE CASE

Appellant was indicted by the Horry County Grand Jury for the offense of murder. R. 167. His case was called to trial on May 18, 2009 before the Honorable Edward B. Cottingham, and a jury. James Galmore represented appellant. Heather Von Herrmann was the solicitor. R. 1.

On May 19, 2009 the jury found appellant guilty of murder. R. 147, ll. 20-23. Judge Cottingham sentenced appellant to 30 years imprisonment. R. 150, ll. 15-18.

This appeal follows.

ARGUMENT

1.

The court erred by allowing Wanda Garrett to testify appellant had grabbed a stick out of the bedroom in anger to hit her in the past since this was impermissible propensity evidence under Rule 404(b), SCRE

Conway Police Officer Reginald Hill was a shift supervisor on May 17, 2005 when a telephone call came in from Sycamore Street about "a subject had been hit in the head with a pipe." R. 19, l. 18 – 20, l. 7. When Hill arrived he found the decedent "laying in a backyard . . . he was laying straight out." R. 22, l. 21 – 23, l. 4.

The decedent was unconscious. Hill remembered appellant and Wanda Garrett both being at the scene. R. 24, ll. 6-20. Appellant later testified that Wanda Garrett told him the decedent, who was grossly intoxicated on drugs and alcohol, had fallen off of the porch and that was why he was laying in the yard. Hill interviewed appellant who told him he had come home and drank with Garrett and the decedent all evening. Appellant said the decedent fell off the porch. Appellant related that he was the only one sober enough to talk to 911and EMS. Officer Hill confirmed that appellant was most sober person at the scene. Tr. 31, ll. 3-19. Hill find a pipe anywhere in the area. Garrett, a Hispanic woman, claimed that the pipe was really a stick and that fact got lost in the Spanish translation. As will be seen infra, Garrett spoke fluent English during her interview with the police. R. 32, ll. 5-24.

Wanda Garrett testified that appellant's house was actually a crack house. She lived there with appellant and her sister for about three or four months. R. 39, l. 9 – 40, l. 11. Garrett claimed at trial that she had been "clean for some period of time now." R. 41, ll. 18-

20. The solicitor ridiculing Garrett – his own key witness – in closing, as will be seen infra, raised doubt about that fact.

Garrett said Jerome Tucker, also known as Cowboy, always showed up "with four cold beers, one for me, one for him, one for my sister, and one for us to share." R. 42, l. 17 – 43, l. 14. Garrett described Tucker as her lover, and she said: "I loved him. I'll love him till the day I die." R. 44, ll. 11-25.

Garrett testified that she was also appellant's "girl." Garrett offered that appellant "took me [in] there because I was homeless, [he] took me and my sister there." R. 45, ll. 5-14.

Garrett maintained that she was drinking and doing drugs that night with Tucker, appellant and "Red." She said Red was a "Kinky haired" Puerto Rican. Garrett claimed everything was "fine" until she started talking with Tucker about moving out of appellant's house. She speculated that appellant may have overheard the conversation, and that caused him to grab a large stick out of the bedroom window. When the solicitor asked if Garrett had seen the stick before, defense counsel objected under Rule 404 (b), SCRE, when Garrett testified that appellant "took it out on me." R. 47, l. 6 – 53, l. 24.

The judge ruled this testimony was permissible and Garrett then said she had seen the stick "on a number of occasions." Garrett also maintained that Tucker stood up to protect her from appellant, and she claimed that appellant hit the decedent – she thought in the shoulder – and Tucker went to the floor. "I said, 'Come on, Cowboy, don't do this to me. Stop playing games.'" Garrett said she thought at first that Tucker was "faking it or passed out" from being intoxicated. She maintained that she ran across the street to call 911. R. 47, l. 6 – 53, l. 24.

Garrett said appellant told her that night that the decedent was drunk and that he fell down the steps. "That's the only thing that happened here." Garret said she was scared to say anything and that "they would have killed me. This is a crack house. They don't play." R. 58, ll. 8-17.

On cross-examination defense counsel Galmore questioned Garrett about her statement to the police and he obviously questioned her memory of the events of that night. He specifically questioned her about the fact the stick he claimed was used was never found. R. 67, l. 12 – 81, l. 10. Counsel also had Garrett admit she remained living in appellant's house for two or three days after appellant's arrest where she claimed she was afraid of people because this was a crack house. Garrett also acknowledged she was never charged with anything in this case. R. 65, l. 11 – 82, l. 12.

On re-direct examination, the solicitor asked to introduce the interview of Garrett's statement to the police. She argued defense counsel had accused Garrett of "recent fabrication." Defense counsel countered that Garrett's statement was hearsay, and it was also an impermissible prior consistent statement. Counsel said he had only cross-examined Garrett on inconsistencies in her statement and testimony. He told the judge he understood the difference between a prior inconsistent statement, and an impermissible prior consistent statement. The judge offered that the statement could not be hearsay, and he ruled that defense counsel raised the issue by questioning Garrett. He therefore admitted the tape into evidence over objection. "A portion of State's exhibit 14, the police interview of Garrett was then played for the jury." R. 83, l. 13 – 86, l. 23. This tape is on file with this Court.

It is unclear from this record exactly how much of this tape was played for the jury, but Garrett did say on the tape that appellant had hit her with the stick and punched her in

the past. She repeated her contention about them drinking and doing drugs and everything being fine until appellant allegedly hit the decedent with the stick.

The sixty-year-old appellant Toomer took the stand in his own defense. R. 108, ll. 13-20. Appellant said he was renting the house and he allowed Garrett and her sister to move in "until they could get their check, and they was [were] supposed to move out." They did not move out as they had promised. R. 110, ll. 2-10.

Appellant testified that on May 18, 2005 he came home with a half gallon of gin and two packs of cigarettes. The others, Garrett, her sister, and Red had already been drinking. Appellant said he did not buy any crack cocaine and there were no drug dealers living at his house. R. 111, ll. 1-21.

Appellant Toomer recalled that he was lying on his bed when Wanda Garrett came in and told him the decedent "fell off the porch." R. 112, ll. 1-22. Appellant went and checked on the decedent and "I figured he was just drunk . . . I just figured he was going to sleep it off and get up." Appellant therefore did not take any action. R. 113, ll. 2-17.

Appellant denied that he kept a stick in his window, and he said he did not hit the decedent. R. 118, ll. 1-21.

In his closing argument the solicitor told the jury that appellant hit the decedent because he was jealous of her being with Tucker. "[W]e may look at Wanda Garrett and we may say, `who in the world would want that crack-smoking Wanda Garrett,'" but she maintained that was appellant's motivation to hit Tucker." R. 135, ll. 15-23.

As stated, it is unclear from this record exactly how much of this tape was played for the jury, but Garrett did say on the tape that appellant had hit her with the stick and

punched her in the past and she repeated her statement about them drinking and doing drugs and everything being fine until appellant allegedly hit the decedent with the stick.

Discussion

Rule 404(b), SCRE states that "evidence of other crimes, wrongs, or acts is not admissible *to prove the character of the person in order to show action in conformity therewith* . . . " (Emphasis added). Garrett's testimony that appellant had hit her or threatened her with the stick on prior occasions was gratuitous and it certainly was not admissible under any exception to State v. Lyle 125 S.C. 406, 118 S.E. 803 (1923). See, also, State v. Clasby 385 S.C. 148, 682 S.E.2d 892 (2009).

The purpose of not allowing such evidence of a prior bad act is the jury can impermissibly use propensity evidence to conclude the defendant was just once again acting in conformity with a character trait. Therefore, such evidence has the tendency to cause a jury to convict a person based on his tendency to commit bad acts. Here, the tendency to convict appellant based on Garrett's accusation that appellant had used the stick, and resorted to violence against her, on a prior occasion or occasions when he was angry.

Appellant had the right to be tried only for crime set forth in the indictment. State v. Thompson 230 S.C. 473, 96 S.E.2d 471 (1957); State v. Peake 302 S.C. 378, 396 S.E.2d 362 (1990); State v. Gregory 191 S.C. 212, 4 S.E.2d 1 (1939).

This case was a swearing contest between Wanda Garrett and appellant. There were no other witnesses of substance as to how the decedent came to be found lying in the backyard unconscious. Garrett's credibility was very shaky since she was a homeless crack addict before appellant took her in to his home. Her story was hard to grasp since parts of it just appear incoherent. It was clear the solicitor wished for the jury to conclude from

Garrett's testimony that appellant was a jealous man and a violent person when it came to Garrett. He had used that stick on her in the past, and he tried to do so again when Tucker allegedly came to her rescue and got hit himself.

The error was not harmless, and the appellant should be granted a new trial.

ARGUMENT

2.

The court erred by playing Wanda Garrett's statement to the police since it constituted an impermissible prior consistent statement and appellant had not alleged recent fabrication on her part as the solicitor asserted.

Relevant Facts

As seen, defense counsel objected to interview of Wanda Garrett being played for the jury. He argued he had only questioned Garrett about inconsistencies in her statement, and he statement to the police on that was an impermissible prior consistent statement. The judge overruled appellant's objection that this was an impermissible prior consistent statement, and allowed for the tape to be played for the jury. R. 84, l. 4 – 86, l. 23. It is unfortunately impossible to tell from the record exactly how much of Garrett's interview was played for the jury.

In this interview Garrett told the police they had been drinking and doing drugs and everything was fine until appellant got the stick out of the window. She said he had done this "plenty of times," and she clearly alleged to the police that appellant had used the stick on her in the past. Garrett told police that the stick should be found in the neighbor's yard because that was where Red threw it after the alleged assault. Garrett also told police she had been drinking gin and the defendant was drinking vodka. She said she did not know how the decedent got outside where he was found lying in the yard.

Discussion

Appellant's formal cross-examination of Garrett about her statement to police was not an allegation of a "recent fabrication" or "improper influence or motive" under Rule 801(d)(1)(B), SCRE. See, State v. Saltz 346 S.C. 114, 551 S.E.2d 240 (2001).

Although questioning a witness, here Garrett, about a prior inconsistent statement does call her credibility into question, this is not the same as charging a witness with recent fabrication. See, Tome v. United States 513 U.S. 150 (1995).

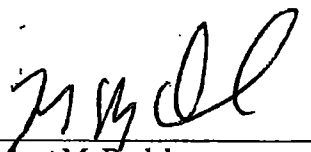
The playing of the tape of Garrett's prior consistent statement was extremely prejudicial since this case was a swearing match between Garrett's hazed crack induced allegation that appellant hit the decedent with a stick versus appellant's testimony that he was told the decedent fell off the porch which was consistent with what law enforcement saw when they arrived at the scene.[1]

[1] Appellant will move to hold this appeal in abeyance and remand for a reconstruction hearing since it is impossible to tell what portion of Wanda Garrett's interview with the police was played for the jury.

CONCLUSION

By reason of the foregoing arguments, appellant's conviction should be reversed and his case remanded to the Horry County Court of General Sessions for a new trial.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT.

This 29th day of June, 2011.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Edward B. Cottingham, Circuit Court Judge

THE STATE,

RESPONDENT,

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APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Donald J. Zelenka, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201, this 29th day of June, 2011.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 29th day of June, 2011.

(L.S.)
Notary Public for South Carolina

My Commission Expires: May 16, 2021 .