

STATE OF SOUTH CAROLINA **RECEIVED**

IN THE COURT OF APPEALS APR 01 2015

Appeal from Spartanburg County **SC Court of Appeals**

R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TIMOTHY GEORGE HOBART,

APPELLANT

APPELLATE CASE NO. 2014-001052

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

In this trial for resisting arrest and malicious injury to personal property, did the trial judge err in admitting, to show motive pursuant to Rule 404(b), a certified copy of the clerk's affidavit in support of a rule to show cause order from family court naming the Appellant and containing handwritten notes of the process server when the prejudicial impact of the document substantially outweighed the probative value.

STATEMENT OF THE CASE

In May of 2013 the Spartanburg County Grand Jury indicted Hobart for resisting arrest and malicious injury to personal property, indictment #13-GS-42-2402. On May 6, 2014, Hobart proceeded to jury trial before the Honorable R. Knox McMahon. E. Joshua Schultz represented Hobart at trial. Russell D. Ghent and Kate Robinette prosecuted the case. The jury returned with verdicts of guilty on both counts. Judge McMahon sentenced Hobart to one year for resisting arrest and thirty day for malicious injury to personal property. A timely notice of intent to appeal was served on May 14, 2014. This appeal follows.

STATEMENT OF FACTS

On September 21, 2012, a Rule to Show Cause order issued for Appellant from the Spartanburg County Family Court. (R. p. **, State's Exhibit #21 for ID). On October 10, 2012, Deputy Lana Hendrix with the civil division of the Spartanburg County Sheriff's Office went to Appellant's house to serve Appellant with the Rule to show Cause. (Tr. pp. 143-144). Deputy Hendrix testified that she had attempted to serve the Rule to Show Cause on four previous occasions. (Tr. p. 164, line 18 – p. 165, lines 1-10).

When Deputy Hendrix pulled her vehicle into the Appellant's driveway on October 10, 2012, to serve the Rule to Show Cause she ran over a piece of cardboard containing nails which flattened her front right tire. (Tr. p. 166, lines 11-25). The State's theory of the case was that Appellant placed the nailed cardboard in the driveway to avoid service of process. The nailed cardboard formed the basis for both the resisting arrest and the malicious injury to personal property charges. (R. p. **, Indictment).

ARGUMENT

In this trial for resisting arrest and malicious injury to personal property, the trial judge erred in admitting, to show motive pursuant to Rule 404(b), a certified copy of the clerk's affidavit in support of a rule to show cause order from family court naming the Appellant and containing handwritten notes of the process server when the prejudicial impact of the document substantially outweighed any probative value.

Prior to trial the judge conducted a hearing on the admissibility of certain family court documents. (Tr. pp. 39-114). The State sought to admit Contempt Orders and Rule to Show Cause Orders. (Tr. pp. 92-95; State's Exhibits #14-20). The State argued that the documents were admissible under the res gestae theory. (Tr. p. 96, lines 17-21). The judge ruled State's Exhibits #14-20 inadmissible as the documents reflected that Appellant was behind in child support payments. (Tr. p. 98, lines 13-21). The judge then asked the State the purpose of admitting the documents. (Tr. p. 98, lines 18-21). The State responded, "I'm trying to get in, Your Honor, his knowledge of the process, the fact that he has been held in contempt, the fact that he is persistently resistant to authority. And that, therefore, makes him the most likely suspect to have put those nails through the cardboard and put them in the driveway to thwart whoever returned again to serve him." (Tr. p. 98, line 22 – p. 99, lines 1-3). Appellant objected. (Tr. p. 99, line 6 – p. 100, lines 1-4).

The State then moved to admit another Rule to Show Cause Order, State's Exhibit #21, which contained notes made by Deputy Hendrix, the process server. (Tr. pp. 101 – 103). The judge noted that the document went to motive and intent pursuant to Rule 404(b), SCRE. (Tr. p. 102, lines 2-14). The prosecutor agreed and stated, "I offer State's Exhibit 21 for purposes of this hearing only, which is literally the color of the rule to show cause used as a memo for the exact points that Your Honor has just made in terms of what she did

leading up to, and then there is testimony about what happened on the 10th. She is a very conscientious, very thorough officer, and as Your Honor says, intent or motive.” (Tr. p. 103, lines 5-11). Appellant objected to the admission of State’s Exhibit #21 because it created undue confusion to the jury. (Tr. p. 104, lines 5-23).

In reference to State’s Exhibit #21, the judge first stated, “Let me think about the document itself. I would think it should be redacted off of it. I would give them a charge on it about the redaction is neither for or against Mr. Hobart [Appellant] or for or against the State. I have just decided for certain issues. You can’t speculate on it. You can’t this, that and the other.” (Tr. p. 106, lines 4-9). The judge ultimately found State’s Exhibit #21 admissible, finding the probative value outweighed undue prejudice. (Tr. p. 106, line 23 – p. 107, 108, lines 1-4). Appellant objected arguing the document was too prejudicial. (Tr. p. 112, lines 20 – p. 113, lines 1-3). Both sides agreed to redaction of the arrearage amounts, personal identifiers, the printed language on the form, “BE ADVISED THAT YOUR ABILITY TO PAY IS A CRITICAL ISSUE IN THIS CONTEMPT PROCEEDING” and the Deputy’s note, “Put nails in driveway for me and flat my tire on county car.” (Tr. pp. 109-113; R. p. ***, State’s Exhibit #21 for ID). Despite the redactions, Appellant objected to the admission of the Rule to Show Cause Order. (Tr. p. 113, line 22 – p. 114, lines 1-2). The first redacted version was marked State’s Exhibit 21A. (R. p. **; State’s Exhibit #21A).

At trial Appellant objected to State’s Exhibit #21A. (Tr. p. 145, lines 1-16). Appellant objected on two grounds. Appellant argued that the copy marked State’s Exhibit #21A was not the original under the best evidence rule. (Tr. pp. 145-156). Appellant also renewed the objection to State’s Exhibit #21 as being more prejudicial than probative. (Tr.

p. 147, lines 5-16). The State obtained a certified copy of State's Exhibit #21 which was redacted and marked State's Exhibit #21B. (Tr. p. 155, line 15 – p. 156, lines 1-25; R. p. **, State's Exhibit #21B). Appellant withdrew his objection to the document based on the best evidence rule but renewed his objection pursuant to Rule 403, SCRE. (Tr. p. 157, lines 1-3). The judge ruled that the probative value of the document outweighed any danger of undue prejudice. (Tr. p. 157, lines 4-14). State's Exhibit #21B was admitted in evidence over objection. (Tr. p. 163, lines 1-16).

State's Exhibit #21B, the Rule to Show Cause Order, is a redacted certified copy of the clerk's affidavit in support of a Rule to Show Cause order in family court naming the Appellant and containing handwritten notes of the deputy process server. The redacted document still includes a handwritten notation, "Won't come to the door. avoids service." (R. p. **, State's Exhibit #21B). The redacted document also includes handwritten dates and times as well as a note that Appellant was served in the booking department at the jail. The redacted document includes printed language stating, "This CSES case is being scheduled for a Rule to Show Cause hearing because at least one obligation is delinquent." The redacted document also includes an order for Appellant to appear in family court and be prepared to show cause, if any, why he "should not be adjudged in Contempt of Court for such disobedience." The document clearly indicates to the jury that Appellant is behind in child support payments. The trial judge correctly excluded other documents that reflected that Appellant was behind in child support payments. (Tr. p. 98, lines 13-21).

The judge determined that the Rule to Show Cause Order showed motive, pursuant to Rule 404(b), for Appellant to place nailed cardboard in the driveway in an attempt to avoid service of process. (Tr. p. 102, lines 2-14). The judge then found, pursuant to Rule

403, that the probative value of the Rule to Show Cause Order outweighed any danger of undue prejudice. (Tr. p. 157, lines 4-14). The judge erred. The probative value of the order to show motive is substantially outweighed by the danger of unfair prejudice in showing Appellant ignored orders from the family court and was delinquent in making child support payments.

In State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009), the South Carolina Supreme Court wrote:

Evidence of other crimes, wrongs, or acts is generally not admissible to prove the character of a person in order to show action in conformity therewith; however, such evidence may be admissible “to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.” Rule 404(b), SCRE. The evidence admitted must logically relate to the crime with which the defendant has been charged. E.g., State v. Stokes, 381 S.C. 390, 673 S.E.2d 434 (2009); State v. Beck, 342 S.C. 129, 135, 536 S.E.2d 679, 682–83 (2000).

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. Green, 261 S.C. 366, 371, 200 S.E.2d 74, 77 (1973); see also State v. Adams, 322 S.C. 114, 122, 470 S.E.2d 366, 370–71 (1996) (evidence of other crimes which supplies the context of the crime, or is intimately connected with and explanatory of the crime charged, is admissible as *res gestae* evidence).

Nonetheless, even where the evidence is shown to be relevant, if its probative value is substantially outweighed by the danger of unfair prejudice, the evidence must be excluded. See Rule 403, SCRE. Unfair prejudice means an undue tendency to suggest decision on an improper basis. State v. Stokes, *supra*; State v. Beck, *supra*.

The admission of the Rule to Show Cause Order constitutes prohibited propensity or character evidence. The State even told the judge, “I’m trying to get in, Your Honor, his knowledge of the process, the fact that he has been held in contempt, the fact that he is persistently resistant to authority. And that, therefore, makes him the most likely suspect to

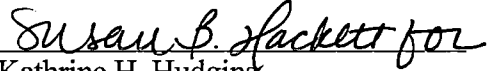
have put those nails through the cardboard and put them in the driveway to thwart whoever returned again to serve him.” (Tr. p. 98, line 22 – p. 99, lines 1-3).

Motive could have been shown by Deputy Hendrix’s testimony that she had been unsuccessful in serving process upon Appellant without reference to the fact that service of process was for failure to pay child support. The probative value of the Rule to Show Cause Order with reference to delinquent child support payments and the improper handwritten hearsay notes by the Deputy is substantially outweighed by the danger of unfair prejudice. The error is not harmless, especially in light of the fact that Appellant was charged with avoiding process and the order includes the Deputy’s handwritten notation, “avoids service.”

CONCLUSION

Based on the above argument, the convictions and sentences should be reversed and the case remanded for a new trial.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 1st day of April, 2015.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 1st day of April, 2015.

Susan B. Hackett for
Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 1st day of April, 2015.

Bailey Reed (L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021