

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable J. Derham Cole, Circuit Court Judge
Appellate Case No. 2014-001092

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JUN 02 2015

SC Court of Appeals

THE STATE,

Respondent,

vs.

NORMAN QUINTON HUNT,

Appellant.

REPLY BRIEF OF APPELLANT

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ARGUMENT

THE TRIAL COURT ERRED IN FINDING THE TESTIMONY OF TELENA BURROW WAS ADMISSIBLE UNDER RULE 404(B) AND RULE 403 OF THE SOUTH CAROLINA RULES OF EVIDENCE.

Mr. Hunt's case seems to be unique in some of the facts it presents to the court. Mr. Hunt was prosecuted under 16-3-655(A)(2) of the South Carolina Code of Laws requiring the State to establish a prior conviction for criminal sexual conduct. Analyzing the issue by reference to the Supreme Court's ruling on a burglary statute requiring the State to establish prior burglary convictions as an element of the offense the trial court allowed the State to introduce the prior conviction of Mr. Hunt for Criminal Sexual Conduct with a Minor from 1988 over Appellant's objection. (Tr. pp. 4-10.)

After the alleged victim testified at trial the State moved to introduce the testimony of Ms. Burrow the victim from the earlier conviction pursuant to State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923) claiming the evidence was admissible as it demonstrated the existence of a common scheme or plan. The Judge allowed the testimony of Ms. Burrow finding it was admissible under Rule 404(B) and Rule 403 and more probative than prejudicial.

This allowed the State to go behind the prior conviction which generally would speak for itself and submit to the jury the testimony of a victim of a crime to which the defendant had previously pled guilty and for which no discovery was available making any cross-examination, realistically, impossible.

This decision also eliminated the possible instruction that the admission of the prior conviction was solely to establish an element of the offense and should be used for that purpose alone and not as substantive evidence of guilt which could have diminished the prejudicial impact.

Allowing the testimony of Ms. Burrow was not harmless error as the State alleges in their brief. Without her testimony the case would have turned on the alleged victim's testimony of having been abused for years in a vehicle traveling on some of the most highly traveled parts of Greenville County and at some of the most visible places in Greenville and Spartanburg County with her brother in the vehicle although there were no charges in Spartanburg County, no witnesses to any abuse except her brother who did not completely support her testimony and who's testimony could have been considered suspect by the jury, no photographs of her she alleged were taken, and no pornography which she alleged existed.

In their initial brief the State argues the admission of Ms. Burrow's testimony was harmless error (pp. 26-29) but argues the probative value of her testimony was of such value to the State that would substantially outweigh any danger of unfair prejudice. "Critically, in Appellant's case, the prior bad act evidence was extremely probative and significant due to the lack of conclusive physical evidence corroborating Victim's testimony."

At trial the benefit of this testimony for conviction was argued by the solicitor as a "...point of corroboration" for conviction. The State at trial and in their brief implicitly acknowledges this testimony is not harmless error.

It was, in fact, error to allow the testimony under Rules 404(B) and 403 of the South Carolina Rules of Evidence.

Counsel and this Court are in the position of having to guess what specific facts Judge Cole considered and weighed in making his decision as his ruling (tr. p. 293, l. 2-p. 296 l. 9), mentions the factors the court is to consider but does not make specific factual findings concerning any of the Wallace factors mentioned (State v. Wallace, 384 S.C. 428, 683 S.E. 2d 275 (2009)) failing to provide a record adequate for appellate review.

The State alleged at trial that the testimony of Ms. Burrow should be allowed as part of a common scheme or plan. "Evidence of other crimes, wrongs, or acts is admissible to show a common scheme or plan when a 'close degree of similarity [exists] between the crime charged and the prior bad act.'" State v. Taylor, 399 S.C. 51, 59, 731 S.E.2d 596, 601 (Ct. App. 2012) (quoting State v. Gaines, 380 S.C. 23, 30, 667 S.E. 2d 728, 731 (2008)).

Considering State v. Wallace, 384 S.C. 428, 683 S.E. 2d 275 (2009) the Court should analyze the similarities and dissimilarities between the crime charged and the bad act evidence. The State alleges in their brief (p. 21) that the similarities that exist were:

- (1) The approximate age of the victims when the abuse occurred;
- (2) The biological connection of the victims to Appellant;
- (3) The gender of the victims;
- (4) The locations where Appellant abused the victims;
- (5) The nature of the abuse;
- (6) The frequent and continuous manner in which Appellant abused the victims; and
- (7) The generous way Appellant treated the victims when he was not abusing them.

The alleged victim was aged 5-12 when the abuse is alleged to have occurred (tr. p. 91, l. 10-13). Ms. Burrow was around 11 (tr. p. 279, l. 19-23). Further the alleged victim testified the abuse began immediately (tr. p. 93, l. 16-23) while no acts were perpetrated upon Ms. Burrow for over a year after she came into Mr. Hunt's life (tr. p. 279, l. 4-5).

Both women had a familial relationship to Mr. Hunt.

Ms. Burrow testified abuse occurred at the house, work and a motel. At home it is alleged to have occurred

while Ms. Hunt was at work and with no witnesses present. At work it was on a limited basis (arguably once from her testimony) on a weekend when there was no one else about.

The alleged victim did not testify to any abuse at a motel. She testified that the abuse at the house took place while Ms. Hunt was in the house (tr. p.93, l. 5-15) or would come home (tr. p. 120, l. 10-19). Her testimony was that abuse occurred at a different work location on a number of occasions and that she spent many summer days there visible to and interacting with other employees, not hidden in any way (tr. p. 101, l. 11-p.102, l.2) with the specific allegation being she was abused in a cubicle even though others could have easily come back into the building and with security on the premises (tr. p. 142, l. 23-p. 143, l. 22).

The dissimilarities of location are even stronger when the alleged victim's testimony concerning locations is considered. She alleges abuse in the garage and watching pornographic movies there. Ms. Burrow does not mention that location or pornography.

Further, the alleged victim testified at great length of abuse occurring in a moving vehicle on some of Greenville's most used roads and while stopped at various locations including Wal-Marts and shopping malls. Ms. Burrow testified to none of this. Nor did any other witness testify to observing any of this activity although the alleged victim's brother was supposed to be in the back seat of the vehicle. He said he was told to keep his head down and so did not see anything. Ms. Burrow did not testify to any potential witnesses being around during any act.

Ms. Burrow testified that Mr. Hunt abused her by touching and by forced intercourse. "The first time, he tried and it hurt really bad and I bled. And I don't know how long after the first time that he, actually, just went ahead and penetrated anyway." (Tr. p. 305, l. 18-20).

The alleged victim testified that Mr. Hunt had her touch his penis, watch pornography with him, photographed her (tr. p. 112, l. 21-p. 113, l. 21) and performed oral sex on him (tr. p. 94, l. 12 and p. 103, l. 3-8 and p. 104, l. 10-14). Ms. Burris did not testify to any of these acts.

Additionally the alleged victim testified that Mr. Hunt did not have intercourse with her and that when he tried she would cry and he would stop (tr. p. 99, l. 3-9) virtually the opposite of Ms. Burrow's testimony that even though it really hurt and she bled he just went ahead and penetrated anyway.

Neither Ms. Burrow nor the alleged victim tied any gift-giving to the alleged abuse. In fact the alleged victim specifically said Mr. Hunt did not link the purchase of item(s) to any abuse (tr. p. 109, l. 5-9).

The gap between the abuse of Ms. Burrow and that alleged in the present case is 15 years at least. The alleged victim was born in 1998 and the abuse is alleged to have begun when she was 5 (2013). Mr. Hunt

pled guilty in 1988 to the charge involving Ms. Burrow. So even if the abuse of Ms. Burrow occurred the year he pled guilty and just as the alleged victim turned 5 at least 15 years passed. The alleged victim did not exist at the time of Mr. Hunt's plea in 1988. The State alleges in its brief that this lapse in time did not result from the abandonment of the common scheme or plan but instead resulted from the fact Appellant could not resume his common scheme or plan until the alleged victim had been born and introduced into his life.

Even if one ignores the complete lack of any evidentiary basis for this argument it is absurd and points out the danger of this similarity/dissimilarity argument.

At trial the State argued the lack of any threats or coercion testified to by either woman was a similarity that made Ms. Burrow's testimony admissible. The absence of a similarity, not the existence of one, involving the use of threats or coercion, pointed out as an element to consider in earlier appellate cases, was a point to be considered favorable to the State and supposedly made the testimony more susceptible to a common scheme or plan argument.

The State argued the similarity was that the defendant's means of gaining acquiescence from each victim was his force of personality (there was, of course, no evidentiary basis for that argument as neither woman testified to being under the sway of any force of personality). It appears that argument has been abandoned since the State argues in their brief that Mr. Hunt was generous when not abusing them as the reason for the women submitting without an immediate report.

Now in its brief the State recognizes that while there is no set time limit past which a prior act is simply too remote that the court has considered temporal remoteness in determining whether admission is proper. The probative value of Ms. Burrow's testimony must be weighed in light of the lengthy passage of time without any act indicating any continuous course of action that could be appropriately described as a common scheme or plan. The State's theory is apparently that Mr. Hunt planned that if he had a child who had a granddaughter he would abuse that grandchild. No matter how long it took. No matter that the grandchild did not exist.

The testimony of Ms. Burrow did not establish a common scheme or plan so that it would be admissible as such did not exist and the dissimilarities outweigh the similarities alleged.

Even if the court was to determine the evidence was sufficiently similar to the offense charged pursuant to Rule 404(B) the probative value of the testimony was substantially outweighed by the danger of unfair prejudice.

In non-sexual offense cases "the mere presence of similarity only serves to enhance the potential for

prejudice, "State v. Tuffour, 364 S.C. 497, 613 S.E. 2d 814 (Ct. App.2005) vacated on other grounds 371 S.C. 511, 641 S.E. 2d 24 (2007). "Evidence of prior similar crimes must be used carefully: if the crimes are too similar, they may be considered too prejudicial." State v. Dunlap, 353 S.C. 539, 579 S.E.2d 318 (2003)"Striking" similarity between the prior act and the crime charged only serves to enhance the potential for prejudice. State v. Gore, 283 S.C. 118, 121, 322 S.E. 2d 12, 13.

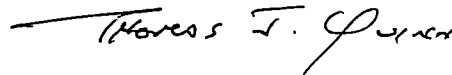
Lyle stated "if the court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt and the evidence should be rejected. State v. Lyle, 125 S.C. at 417, 118 S.E. at 807. "[t]he rationale for this rule is that the overwhelming result of admitting unconnected sexual relationships is to establish an accused's character or propensity to engage in the alleged sexual conduct as a basis for inferring that he committed the charged crime." State v. Rivers, 273 S.C. 75, 254 S.E.2d 299, 300 (1979). This overwhelming result was argued by the State as grounds to convict Mr. Hunt. The State admits in their argument the weakness of the evidence and argues that the evidence was more probative because the State needed it badly for conviction. That argument truly highlights the prejudicial value of Ms. Burrow's testimony and the prejudicial error of admitting it.

CONCLUSION

Mr. Hunt asks this court to find the admission of Ms. Burrow's testimony was error and grant him a new trial.

Respectfully submitted,

May 29, 2015



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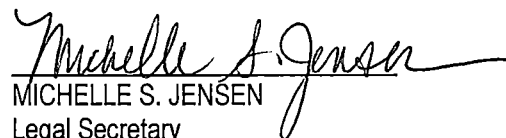
Appellant.

PROOF OF SERVICE

I, Michelle S. Jensen, certify that I have served the within Reply Brief of Appellant by depositing two copies of the same in the United States Mail, postage prepaid, addressed to:

Mark R. Farthing, Assistant Attorney General
Office of the Attorney General
P.O. Box 11549
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I also certify that all parties required by Rule to be served have been served.
This 29th day of May 2015.



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SC Court of Appeals

May 29, 2015

The Honorable Jenny A. Kitchings
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RE: State v. Norman Quinton Hunt – Appellate Case 2014-001092

Dear Ms. Kitchings,

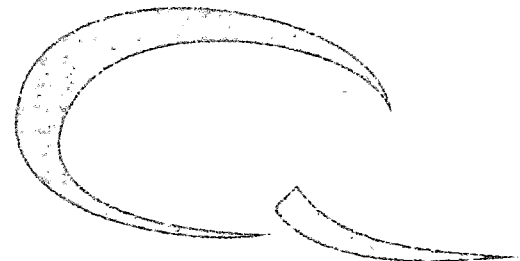
Enclosed please find the original Reply Brief of Appellant, along with proof of service, for filing the above-referenced appeal.

Very Truly Yours,

A handwritten signature in cursive script that reads 'THOMAS J. QUINN'.

Thomas J. Quinn
Attorney at Law

TJQ/msj
Enclosures



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