THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DARLINGTON COUNTY
Court of General Sessions

J. Michael Baxley, Circuit Court Judge

Appellate Case No. 2014-000395

The State, ...Respondent,

v.

Damyon M. Cotton, ...Appellant,

APPELLANT'S *REPLY* BRIEF

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ARGUMENT

I. The trial court's admittance of the prior bad act testimony constitutes reversible error.

Respondent contends that the trial court's error in admitting the prior bad act testimony was harmless. *See* (Respondent's Br. pp. 24-27). For several reasons, this argument is without merit. As an initial matter, the State went to great lengths at trial to get the prior bad act testimony admitted into evidence. (R. p. 3, l. 4-p. 81 ll. 1-18). Thus, at trial, even the State did not think a conviction was possible without the prior bad act testimony. However, now on appeal, the State takes the opposite position and argues that admitting the prior bad act testimony was an insubstantial error which did not affect the result of the trial. *See* (Respondent's Br. pp. 24-27). Contrary to the State's suggestion on appeal, it is impossible to conclude that, without reference to the uncharged prior sexual assault, the evidence of Cotton's guilt was overwhelming or that Cotton's guilt was the only rational conclusion that could have been reached from the evidence presented. Thus, the trial court's error in admitting this evidence was not harmless and constitutes reversible error.

"To deem an error harmless, this court must determine 'beyond a reasonable doubt the error complained of did not contribute to the verdict obtained.'" *State v. Fonseca*, 383 S.C. 640, 650, 681 S.E.2d 1, 6 (Ct. App. 2009), *aff'd*, 393 S.C. 229, 229, 711 S.E.2d 906, 906 (2011) (quoting *Taylor v. State*, 312 S.C. 179, 181, 439 S.E.2d 820, 821 (1993)). An error will ***only*** be deemed harmless when guilt has been conclusively proven by competent evidence such that ***no other rational conclusion*** can be reached. *State v. Tutton*, 354 S.C. 319, 334, 580 S.E.2d 186, 194 (Ct. App. 2003) (citing *State v. Berry*, 332 S.C. 214, 220, 503 S.E.2d 770, 773 (Ct. App. 1998)).

Respondent argues that the trial court's error in admitting the prior bad act testimony was harmless because there was overwhelming evidence of Cotton's guilt. *See* (Respondent's Br. pp. 24-27). Respondent contends that the following evidence established Cotton's overwhelming guilt: (1) Cusack testified that Cotton assaulted her; (2) Cusack provided a consistent version of the events of the alleged assault to the nurse and responding police officers; (3) Cusack provided police with Cotton's license plate number and picked him out of a line-up; and (4) Cotton's DNA was found on the buttonhole of Cusack's jeans. *See* (Respondent's Br. pp. 25-26).

First, regarding Cusack's testimony that Cotton assaulted her, such testimony contained several inconsistencies. Further, Cotton vehemently denied these accusations at trial and established an alibi defense to counter such. ***Second***, regarding Cusack's alleged consistent story, there were numerous discrepancies in the testimony of Cusack, the responding police officers, the nurse, and Cotton as to the version of events that occurred on the night of the alleged sexual assault. Cusack's testimony and the different versions of the alleged assault that she provided to the nurse and police officers can be best described as all over the map. Cusack's explanation of how she met Cotton is anything but clear. At certain points during trial, Cusack testified she met Cotton through a friend, while at other points, she testified that they met through a chat line. (R. p. 120, ll. 13-15, p. 132, ll. 8-9, p. 164, ll. 9-10). The police officers and nurse who conducted the medical examination of Cusack testified that Cusack told them that she met Cotton through a mutual friend named Tanzy and that she never mentioned anything about meeting Cotton through a chat line. (R. p. 204, ll. 15-23, p. 209, ll. 22-25, p. 227, ll. 10-12, pp. 464-65).

Further, in her written statement to police, Cusack explicitly reported that in the movie theater parking lot "[Cotton] forced me to have sex with him." (R. p. 161, l. 21-p.163, l. 20, p. 498). Cusack did not testify to this at trial nor did she tell the nurse or responding police officers this on the night of the alleged assault. (R. p. 209, l. 13-p. 210 l, 6, p. 223, l. 24-p.224, l. 5, p. 465). The responding officers testified that Cusack told them that Cotton requested oral sex in the movie theater parking lot; however, she never told them that Cotton sexually assaulted her there. (R. p. 209, l. 13-p.210 l. 6, p. 223, l. 24-p.224, l. 5). Thus, to the contrary, Cusack's story was anything but consistent.

Third, the fact that Cusack knew who Cotton was and the kind of car he drove, simply added nothing to the State's case. ***Fourth***, regarding Cotton's DNA being found on the buttonhole of Cusack's jeans, Respondent contends that this was the most significant evidence in establishing Cotton's guilt. *See* (Respondent's Br. p. 26). Respondent also incorrectly asserts that Cotton failed to provide a plausible explanation as to why his DNA was detected on the buttonhole of Cusack's jeans. *See* (Respondent's Br. p. 26). To the contrary, the presence of Cotton's DNA can be explained by Cotton coming into physical contact with Cusack at an earlier time unrelated to the alleged assault. Cotton testified, and Cusack's testimony confirmed, that Cusack and Cotton had seen each other in person approximately two weeks prior to the night of the alleged assault. (R. p. 128, l.25-p.129, l. 6, p. 156, ll. 22-25, p.350, l. 16-p.352, l. 10). Cotton testified that there was physical contact between him and Cusack at this in person meeting. (R. p. 350, l. 16-p.352, l. 10). Cotton explained that he gave Cusack a hug when he saw her and that, in doing so, it was likely that he touched Cusack's jeans that she was wearing at the time. (R. p. 351, l. 12-p.352, l. 5). Also, significantly,

Respondent fails to mention the fact that another unidentified individual's DNA, other than Cusack's and Cotton's DNA, was found on the buttonhole of Cusack's jeans. (R. p. 227, ll. 13-21, p. 261, l. 21-p.262, l. 1, p. 273, l. 10-274, l. 10, pp. 476-78).

Finally, and perhaps most importantly, there was no physical evidence actually linking Cotton to the alleged assault. Both responding police officers testified that they were unable to locate the incident location and the condom that was allegedly used during the assault. (R. p. 200, ll. 12-17, p. 204, l.24-p. 205, l. 8, p. 212, ll. 7-15). The medical examination returned no forensic evidence which linked Cotton to the alleged assault. (R. p. 222, ll. 8-12). Vaginal, oral, and rectal swabs; vaginal, oral, and rectal smears; fingernail scrapings; pubic hair combings; and buccal swabs from Cusack were collected during the examination. (R. p. 239, ll. 11-17, p. 469). No spermatozoa of Cotton was found on the smears; no semen of Cotton was found on the swabs; no DNA of Cotton was identified from the fingernail scrapings; and no hair foreign to Cusack was found from the pubic hair combings. (R. p. 374, l. 3-p.375, l. 9, p. 472). Additionally, all clothing items collected, which included a pink shirt, black shirt, blue jeans, underwear, and a yellow bra, were tested for semen due to the fact that oral sex was allegedly performed. (R. p. 238, ll. 1-7, pp. 464 & 469-70). No semen of Cotton was found on any of items of Cusack's clothes that were collected. (R. pp. 474-75). Additionally, the medical examination yielded no evidence that strangulation occurred as Cusack had reported to the nurse and in her written statement to police. (R. pp. 467, 498). The only evidence from the medical examination that suggested Cusack may have been assaulted was the scratch marks found on her buttock and thigh. (R. pp. 467-68). However, these scratch marks in no way linked Cotton to the alleged assault.

Furthermore, Cotton–although under no obligation to do so–presented evidence establishing his innocence. Cotton vehemently denied Cusack's accusations, provided an explanation as to why Cusack would falsely accuse him of assault, and submitted an alibi defense. (R. p. 343, l. 22-p.344, l. 5, p. 347, ll. 5-16, p. 347, l. 17-p.348, l. 13). At trial, Cotton explained that he and Cusack had a romantic relationship which ended badly after he discovered she was cheating on him. (R. p. 344, l. 6-p.347, l. 1). Cotton testified that Cusack was upset over the break-up and indicated to Cotton that she planned to retaliate against him in some way for ending their relationship. (R. p. 345, ll. 15-17, p. 347, ll. 5-16).

Cotton also presented an alibi defense when he testified that he was at his friend Calvin Harrison's house from early afternoon until 9:00 or 10:00 p.m. on Friday, February 1, 2013. (R. p. 347, l. 17-p.348, l. 13). Cotton stated that he always spent every Friday at Calvin's house. (R. p. 348, ll. 14-18). Calvin Harrison testified and corroborated Cotton's alibi defense. (R. p. 330, l. 18-p.332, l. 15). Additionally, Cotton testified the car that Cusack alleged Cotton used during the assault was inoperable at the time of the alleged assault. (R. p. 348, l. 22-p.349, l. 4). Further, three witnesses, including Cotton's grandmother and father and Harrison, corroborated Cotton's testimony that his car was not operational at the time of the alleged assault. (R. p. 302, ll. 22-24, p. 307, ll. 18-21, p. 308, l. 17-p.309, l. 12, p. 316, ll. 4-6, 320, l. 22-p.323, l. 19, p. 330, l. 18-p.331, l. 13).

In sum, the inconsistencies in the witnesses' testimony, the evidence that the defense presented, and the lack of physical evidence make it impossible to determine beyond a reasonable doubt that the error of admitting the prior bad act testimony did not

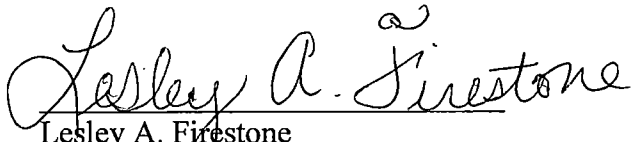
contribute to the verdict. Indeed, our appellate courts routinely reject arguments that the admission of prior bad act testimony constitutes harmless error. *See Tutton*, 354 S.C. at 334, 580 S.E.2d at 194 (rejecting the State's argument that admitting evidence of the prior uncharged sexual assault was harmless when evidence at trial consisted entirely of the victim's accusations against the defendant, the defendant denied the accusations, and the medical evidence was inconclusive); *Berry*, 332 S.C. at 220, 503 S.E.2d at 773 (concluding that admitting the prior bad act testimony in a sexual assault trial constituted reversible error where credibility questions and inconsistencies in witnesses' testimony made it impossible for the court to conclude that, without reference to the prior bad act, the evidence of the defendant's guilt was overwhelming); *Fonseca*, 383 S.C. at 650, 681 S.E.2d at 6 (rejecting the State's argument that evidence of the prior bad act was harmless because the prejudicial tendency of admitting the prior bad act testimony affected the verdict); *State v. Fletcher*, 379 S.C. 17, 25-26, 664 S.E.2d 480, 484 (2008) (concluding that the error in admitting a witness's testimony was not harmless where there was little evidence that defendant committed the crime and the only function of the witness's testimony was to demonstrate defendant's bad character).

Here, evidence of the prior bad act amounted to an attack on Cotton's character and credibility, issues that were central to his defense. *See* Berry, 332 S.C. at 220, 503 S.E.2d at 773 (concluding that evidence of the prior sexual assault amounted to a prejudicial attack on the defendant's character and credibility, which were central to his defense, and thus was not harmless error). The impact of this testimony undoubtedly contributed a great deal to the verdict, and this Court cannot and should not ignore its

prejudicial impact. Consequently, the trial court's error in admitting the prior bad act testimony cannot be deemed harmless.

CONCLUSION

For the reasons set forth, this Court should reverse Appellant's convictions and remand the matter for a new trial.



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October 5, 2015

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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below, she served counsel for the Respondent with a copy of the *Appellant's Final Brief* and *Appellant's Reply Brief* by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

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