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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Hampton County

Brooks P. Goldsmith, Circuit Court Judge

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

TONYA MCALHANEY,

APPELLANT

APPELLATE CASE NO. 2014-000255

FINAL BRIEF OF APPELLANT

TIFFANY L. BUTLER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial judge erred in failing to exclude evidence of Appellant's November 24, 2013 burglary arrest in her trial for the November 23, 2013 burglary, under the common scheme or plan and identity exceptions to Rule 404(b), SCRE, because the burglary on November 24th was not part of a common scheme or plan, was not necessary to establish Appellant's identity, and was unfairly prejudicial, which denied Appellant a fair trial?

STATEMENT OF THE CASE

On December 16, 2013, a Hampton County grand jury indicted Appellant for burglary, first degree. R. 300. The matter proceeded to a jury trial before the Honorable Brooks Goldsmith on February 3, 2014. Steve Plexico represented Appellant and Kelvin Wright represented the State. R. 2.

After a two-day trial, the jury found Appellant guilty. R. 298, lines 11- 16. Judge Goldsmith sentenced her to fifteen years imprisonment. R. 299, lines 12 – 19. This brief follows.

ARGUMENT

The trial judge erred in failing to exclude evidence of Appellant's November 24, 2013 burglary arrest in her trial for the November 23, 2013 burglary, under the common scheme or plan and identity exceptions to Rule 404(b), SCRE, because the burglary on November 24th was not part of a common scheme or plan, was not necessary to establish Appellant's identity, and was unfairly prejudicial, which denied Appellant a fair trial.

Motion to Exclude the November 24, 2014 Burglary

Defense counsel for Appellant moved to quash the indictment for the November 24, 2013 burglary on the grounds that all of the elements of burglary were not included in the language in the indictment. R. 38 – 43. The trial judge granted the motion. R. 43, lines 15 – 16.

Defense counsel then moved to exclude any evidence of that alleged burglary from coming in the back door through a purported Lyle[1] exception. R. 90 – 92. Counsel argued that the evidence was not relevant and would be unduly prejudicial to his client. He explained that the burglary on November 24th and the burglary on November 23rd, for which Appellant was on trial, were two separate incidents with a different set of facts and circumstances, and different individuals involved. R. 90 – 92. He argued that it would not be fair to bring in evidence from an indictment that had been quashed, and to do so would be prejudicial and would violate Rule 404(b), SCRE. R. 95.

The assistant solicitor argued that the evidence of the burglary on November 24th would come in under the common scheme or plan and identity exceptions to Rule 404(b),

[1] State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923).

SCRE. He explained that because there was one big investigation and Appellant gave consent to search her home, Appellant's "acts were all connected." R. 92, lines 4 – 5.

The trial judge agreed with the assistant solicitor's reasoning and denied defense counsel's motion to exclude. R. 97, lines 7 – 11. Counsel renewed his objection when the evidence was presented. R. 127, lines 21 – R. 128, line 9. The judge gave no limiting instruction.

Motion for a Continuance

When the assistant solicitor called Appellant's case earlier, he read both indictments to the jury. R. 23, lines 1 – 6. However, later, based on defense counsel's motion to quash, the trial judge quashed the indictment for the November 24th burglary. R. 43, lines 15 – 16. Counsel then moved for a continuance based on the fact that "members of the jury who were in the jury venire at the time [knew] that she [had] been indicted on two separate charges." R. 98, lines 17 – 21. He argued that having both indictments read to the jury panel "unduly prejudiced [his] client." R. 98, line 12.

The trial judge denied the motion for a continuance and gave a curative instruction to the jury to disregard what the assistant solicitor had previously said at the call of the case. R. 44, lines 12 – 13; R. 50, lines 20 – 22. Defense counsel, however, asserted that the prejudice could not be erased or overcome. R. 98, lines 21 – 23.

Relevant Facts at Trial

Appellant and her codefendant, Travis Hair, were on trial together. Neither defendant chose to testify.

The State's first witness was Sgt. Bradford Drawdy of the Hampton Police Department. R. 125. Over defense counsel's objection, Sgt. Drawdy testified that on the

morning of November 24, 2013, he and Officer Ginn received a call from dispatch that a white female had broken into the residence of 108 Plywood Street in Hampton County. R. 127, line 21 – R. 128, line 9. He and Officer Ginn responded to the home and heard movement inside. R. 128, lines 21 – 24. They called the Varnville Police Department for backup. R. 129, lines 1 – 2. Once backup arrived and the perimeter of the house was secure, Sgt. Drowdy and Officer Ginn went inside and found Appellant in one of the bedrooms. R. 129, lines 8 – 20.

Officer Ginn arrested Appellant and drove her to the police station. R. 130, lines 3 – 22. Appellant chose to exercise her right to remain silent but gave police consent to search her home. R. 137, lines 14 – 25; R. 141, line 24 – R. 142, line 1. When officers arrived at Appellant's home, they went inside and found items that were later identified as items that were taken from 108 Plywood Street. R. 138, lines 1 – 5. Major James Bolton spoke to Ricky Sauls who was at Appellant's home when police arrived. R. 148, lines 1 – 2. Sauls admitted to burglarizing 108 Plywood Street with Appellant and Hair on November 23, 2014. R. 140, lines 15 – 24. After being arrested and taken to the police station, he gave a written statement.

Sauls testified that on November 23, 2014, he and Appellant called Larry Crosby to take them to the CVS in town. R. 156, lines 17 – 23. On the way back, Crosby stopped by 108 Plywood Street to look at a truck that he was supposed to buy from Amanda Brown who resided there. R. 157, lines 1 – 5. Crosby told Sauls and Appellant that he had helped Brown move out of the house and that there were pills inside. R. 157, lines 6 – 9.

Sauls stated that he had been drinking that night but remembered that he, Appellant, and Hair all went inside of the house. R. 158, line 3. He admitted to taking knives and

liquor but could not remember whether Appellant took anything. R. 159 – 161. They had been inside the house for ten minutes. R. 165, lines 5 – 7. When they were ready to leave, Sauls called Crosby to come pick them up. R. 165, lines 13 – 23. Sauls explained that it was Crosby's idea for them to go into the house because pills were in there. R. 166, lines 2 – 23. Sauls did not see Appellant come out with pills, however. R. 166, line 25.

Discussion

The trial judge erred in failing to exclude evidence of the November 24, 2013 burglary because those facts were inadmissible under Rule 404(b), SCRE, and unfairly prejudicial, which denied Appellant a fair trial.

Evidence of prior bad acts is inadmissible to show propensity to commit the specific crime charged. Rule 404(b), SCRE. Such evidence may, however, be admissible to establish a motive, intent, absence of mistake, common scheme or plan, or identity of the perpetrator. Rule 404(b), SCRE; see also State v. Fletcher, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008); State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923). Where those acts are not the subject of a conviction, they must first be proven by clear and convincing evidence. State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007). Before evidence of prior bad acts can be admitted, "it must be put to a rather severe test." State v. Brooks, 335 S.C. 140, 142, 515 S.E.2d 764, 765 (Ct. App. 1999). The "acid test of admissibility is the logical relevancy of the other crimes." State v. Timmons, 327 S.C. 48, 52, 488 S.E.2d 323, 325 (1997). Even if such evidence is clear and convincing and falls within a Rule 404(b) exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE; see also State v. Gore, 283 S.C. 118, 322

S.E.2d 12 (1984) ("When . . . the previous alleged bad act is strikingly similar to the one for which [defendant] is being tried, the danger of unfair prejudice is enhanced.")

In cases where evidence of other crimes is offered to prove a common scheme or plan, a court must analyze the similarities between the crime charged and the bad act evidence. State v. Wallace, 384 S.C. 428, 433, 683 S.E.2d 275, 277-78 (2009). A "general similarity" between offenses is not enough. Timmons, 327 S.C. at 52, 488 S.E.2d at 325 (citing State v. Stokes, 279 S.C. 191, 193, 304 S.E.2d 814, 815 (1983)). There must be "a close relationship" between the prior bad act and the crime charged. State v. Ford, 334 S.C. 444, 451, 513 S.E.2d 385, 388 (Ct. App. 1999). The common scheme or plan and identity exceptions to Rule 404(b), SCRE, "are interrelated, as evidence of a common scheme or plan essentially goes to prove the identity of the perpetrator." State v Kennedy, 339 S.C. 243, 247, 528 S.E.2d 700, 702 (Ct. App. 2000). To prove identity, the bad act "must logically relate to the crime with which the defendant has been charged." State v. Beck, 342 S.C. 129, 135, 536 S.E.2d 679, 682-83 (2000); State v. Stokes, 381 S.C. 390, 404, 673 S.E.2d 434, 441 (2009). The evidence introduced must be "necessary" to establish the perpetrator's identity. State v. Carter, 323 S.C. 465, 467-68, 476 S.E.2d 916, 918 (Ct. App. 1996).

In State v. Timmons, 327 S.C. 48, 488 S.E.2d 323 (1997), the Supreme Court held that evidence that the defendant committed a prior armed robbery as a common scheme or plan was inadmissible. In that case, the defendant admitted to committing an armed robbery on April 9, 1993, but denied participating in the robbery on February 27, 1993. The defendant was tried on the February robbery. Id. at 52, 488 S.E.2d at 325. At trial, the State introduced extensive evidence of the April 9th robbery to prove a common scheme or plan.

Id. The State introduced evidence that there were shots fired during both robberies, both occurred in the Cayce/West Columbia area, and they were five weeks apart. Id. at 53, 488 S.E.2d at 326. The State argued that "there was the use of some same elements of clothing . . . the ski mask, the hat, and bandanna." Id.

The Supreme Court, however, found "the only point of similarity with any merit is the alleged similar clothing worn by the robbers". Id. at 53, 488 S.E.2d at 326. Witnesses testified that during the February 27th robbery, one robber wore a ski mask and the other robber wore a bandana over his face. Id. at 53, 488 S.E.2d at 326. Witnesses who testified about the April 9th robbery were inconsistent in their description of the clothing worn by the robbers. Id. There was no "definite identifying article of clothing" worn by the robbers on both nights. Id. Because there was insufficient similarity between the two crimes, the Court did not find a common scheme or plan and deemed the evidence inadmissible.

In State v. Carter, 323 S.C. 465, 476 S.E.2d 916 (Ct. App. 1996), this Court held that evidence of a prior drug transaction that led to the arrest of the defendant was inadmissible under the identity and common scheme or plan exceptions. Carter, 323 at 466, 476 S.E.2d at 917. In that case, police stopped Gary Stamps for speeding and found crack cocaine in his possession. Id. Stamps told police that he had just purchased the crack from the defendant. Id. Four days later, the police fitted Stamps with audio surveillance equipment and sent him back to defendant's house to buy more crack. Id. The defendant was arrested based on the second drug transaction.

At trial, the State introduced testimony of the defendant's prior drug sale to Stamps. The State argued that both transactions were "substantially similar" and established a "common scheme or plan of how drugs were sold." Carter, 323 at 466, 476 S.E.2d at 918.

Further, the evidence of the prior drug sale was necessary to prove the defendant's identity. Id.

This Court disagreed and found the prior drug sale "was not necessary to establish [the defendant's] identity" in the second transaction. Id. Stamps "indicated no uncertainty as to who sold him the drugs" and there was testimony from other officers of the second transaction. Id. This Court further explained that "testimony of a prior drug sale using a similar sales technique is not relevant to prove a single charge of distribution." Id.

Here, the trial judge erred in admitting evidence of the November 24th burglary. This evidence does not fall under the common scheme or plan or identity exceptions to Rule 404(b), SCRE and is unfairly prejudicial.

The Appellant was arrested inside the house at 108 Plywood Street during the morning of November 24th and was alone. R. 127 – 139. There was testimony from Randy Sauls that three people went into the house on November 23rd at "about seven o'clock." R. 158, line 11. There was no evidence presented that the house was entered into in any distinctive manner. There was no evidence that similar items were taken during both burglaries. The only common element is that Appellant was found inside the house on November 24th and was alleged to have been inside the house on November 23rd.

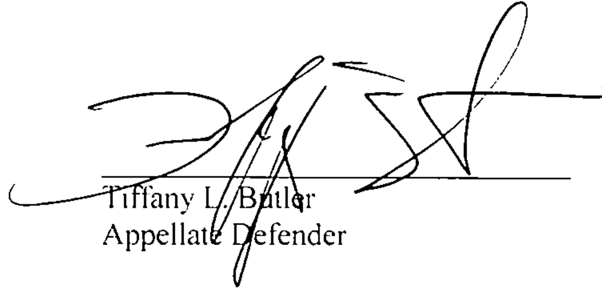
Evidence from the November 24th incident was not necessary to prove Appellant committed the burglary on November 23rd. The testimony from Sauls alone identified Appellant as participating in the November 23rd burglary. The fact that Appellant's November 24th arrest led to evidence of her involvement in the November 23rd burglary was not relevant to prove that she committed the November 23rd burglary.

Hearing that Appellant was arrested inside of the same house for which she was on trial for burglarizing, without a limiting instruction from the judge, allowed the jury to make the impermissible inference that because Appellant committed the burglary on November 24th, she committed the burglary on November 23rd. The jury panel had already heard the assistant solicitor read two indictments for burglary before the judge granted defense counsel's motion to quash the indictment. The November 24th burglary had absolutely **no** probative value and should not have been admitted into evidence. Even if it did have probative value, it was outweighed by its unduly prejudicial effect. Because this evidence was admitted, Appellant was unfairly prejudiced and denied a fair trial.

CONCLUSION

For the foregoing reasons, Appellant Tanya McAlhaney requests this Court to reverse her conviction and sentence and remand her case for a new trial.

Respectfully submitted,



Tiffany L. Butler
Appellate Defender

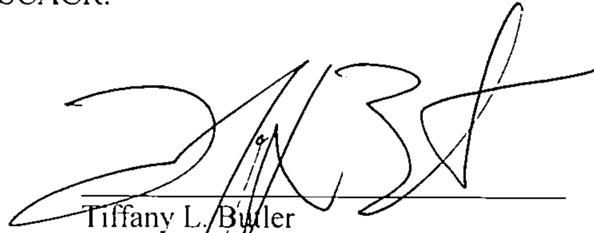
ATTORNEY FOR APPELLANT

This 13th day of May, 2015.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR.

May 13th, 2015



Tiffany L. Butler
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

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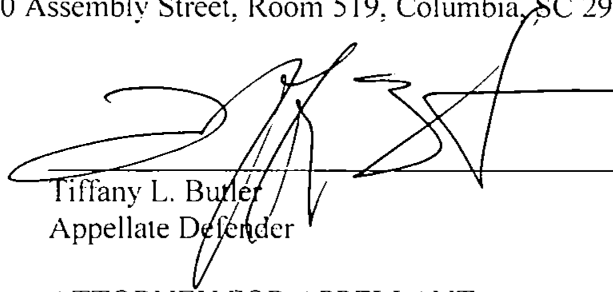
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 13th day of May, 2015.



Tiffany L. Butler
Appellate Defender

ATTORNEY FOR APPELLANT

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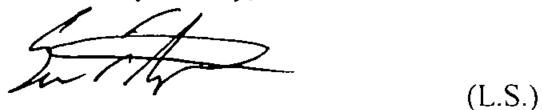
this 13th day of May, 2015.



______________________________(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022 .