

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Williamsburg County

Clifton Newman, Circuit Court Judge

RECEIVED
JUL 10 2015
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

FARON MAURICE CLEMENTS,

APPELLANT

APPELLATE CASE NO. 2014-002236

ANDERS BRIEF OF APPELLANT

SUSAN B. HACKETT
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

TABLE OF CONTENTS

TABLE OF CONTENTS	1
TABLE OF AUTHORITIES.....	2
STATEMENT OF ISSUE ON APPEAL	3
STATEMENT OF THE CASE	4
STATEMENT OF THE FACTS	5
ARGUMENT	
The trial judge erred in allowing the introduction of testimonial and photographic evidence of firearms found in Appellant's home where the evidence was irrelevant to the charges against him and any probative value of the evidence was substantially outweighed by the danger of unfair prejudice.	8
CONCLUSION.....	15
PETITION TO BE RELIEVED AS COUNSEL	16

TABLE OF AUTHORITIES

Cases

<u>State v. Alexander</u> , 303 S.C. 377, 401 S.E.2d 146 (1991)	13
<u>State v. Cheeseboro</u> , 346 S.C. 526, 552 S.E.2d 300 (2001)	12
<u>State v. Lyles</u> , 379 S.C. 328, 665 S.E.2d 201 (Ct. App. 2008).....	12
<u>State v. Orozco</u> , 392 S.C. 212, 708 S.E.2d 227 (Ct. App. 2011).....	12
<u>State v. Schmidt</u> , 288 S.C. 301, 342 S.E.2d 401 (1986).....	12
<u>State v. Wiles</u> , 383 S.C. 151, 679 S.E.2d 172 (2009).....	10
<u>Staubes v. City of Folly Beach</u> , 339 S.C. 406, 529 S.E.2d 543 (2000)	11
<u>Toole v. Salter</u> , 249 S.C. 354, 154 S.E.2d 434 (1967)	12

Rules

Rule 401, SCRE.....	12
Rule 402, SCRE.....	12
Rule 403, SCRE.....	12

STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in allowing the introduction of testimonial and photographic evidence of firearms found in Appellant's home where the evidence was irrelevant to the charges against him and any probative value of the evidence was substantially outweighed by the danger of unfair prejudice?

STATEMENT OF THE CASE

On October 9, 2014, a Williamsburg County grand jury indicted Appellant for two counts of criminal sexual conduct with a minor in the second degree (2014-GS-45-0247). R. 282 - 283. The state, represented by Kimberly V. Barr, called the case for trial on October 13, 2014 before the Honorable Clifton B. Newman and a jury. M. Amanda Shuler represented Appellant. R. 14. The jury found Appellant guilty as charged. R. 237, lines 21-23. Judge Newman sentenced Appellant to eleven years' imprisonment on each count and ordered the sentences to be served concurrently. R. 279, line 25 – R. 280, line 1; R. 284 - 285.¹

Appellant filed a notice of appeal. This brief follows.

¹ At the time of his convictions, Appellant was serving a probation sentence. During the sentencing proceeding, the probation agent asked the judge to find Appellant was in violation of his probation based upon the convictions. After finding Appellant had violated the terms of his probation, Judge Newman terminated his probation and converted the restitution previously ordered into a civil judgment. R. 247, line 14 – R. 249, line 23; R. 269, line 23 – R. 274, line 2; R. 279, lines 9-11.

STATEMENT OF THE FACTS

On May 30, 2013, Minor ran away from home for the third time. R. 66, line 24 – R. 67, line 10; R. 98, lines 8-10. Initially, she went to “a boy friend’s house” where she stayed for approximately two hours. R. 67, line 11 – R. 68, line 5. She spent the night of May 30, 2013 at the boy’s grandmother’s house. R. 68, lines 6-21. During this time she was running from police because she knew the police were looking for her as a missing person. While running, she lost her shoes in a ditch. R. 69, lines 20-25. She believed she met Appellant on June 2, 2013² when she was shoeless and walking down the road. R. 69, lines 2-18; R. 70, lines 3-19. Appellant offered her a ride, which she accepted. Minor lied to Appellant about her name and her age because she feared he would realize she was the missing person on the news. R. 71, line 15 – R. 72, line 9; R. 101, lines 13-22. Appellant asked about her missing shoes and she made up a story about her boyfriend Shawn stealing her shoes. She even made up a “light blue trailer” where her boyfriend lived. However, when Appellant drove around looking for the trailer and her boyfriend to retrieve her shoes, Minor told him to forget about it. R. 73, lines 1-17.

Thereafter, Appellant took Minor to a gas station where he bought water and gum for her. R. 73, line 25 – R. 74, line 22. He offered to buy Minor some food, but she declined. R. 100, line 22- R. 101, line 12. Then, Appellant and Minor went to Appellant’s home. R. 74, line 25. Minor claimed she saw a male looking out the window as they approached. R. 75, lines 1-8. When she arrived at Appellant’s home, she took a bath and changed into clothes that Appellant allowed her to use because she

² According to the indictment, the first sexual encounter occurred “on or about June 1, 2013” and the second occurred “on or about June 2, 2013.” R. 282-283.

was dirty and had no clean clothes after being on the streets for several days. R. 75, lines 10-24; R. 79, lines 15-21. Appellant claimed Minor left her at the home with the other man. She further claimed the man offered to pay her \$50 for oral sex, but she refused. R. 75, line 25 – R. 78, line 24. Additionally, she claimed the man asked her to have sex with him, but when she refused, he raped her in the living room. R. 77, lines 8-9.³

According to Minor, when Appellant returned home, she and he “ended up having sex.” R. 78, lines 6-21. Appellant allegedly wore a condom during this sexual encounter. R. 78, lines 22-23. Appellant then took a shower and left the home. Minor went to sleep. R. 79, lines 10-13. When minor woke up, Appellant had returned. R. 80, lines 6-8. Appellant, Minor, and another unknown male went to Shoe Show to buy Minor a pair of shoes. R. 80, lines 12-23.

Minor claimed that she spent the night with Appellant, sleeping in the same room. Tr. 70, lines 18-24. The next morning, Minor cooked and cleaned. R. 84, lines 3-8. She claimed that she performed oral sex on Appellant and the two engaged in sexual intercourse on that day without using a condom. R. 84, lines 14-25; R. 151, lines 10-14. However, that night, Appellant’s girlfriend was at the house. According to Minor, Appellant instructed her to sleep in another bedroom, which she did. R. 86, lines 11-22; R. 87, lines 1-5. The following day, Appellant left and Minor began plundering through his things. R. 87, lines 6-14. She decided she wanted to leave so she called a friend to pick her up using Appellant’s phone, to which she had access the entire time she was there. R. 94, lines 15-17; R. 95, lines 15-25. Before leaving, however, Minor hid a

³ Minor did not disclose this alleged sexual encounter to the police. R. 158, lines 15-23.

blanket she owned under one of the beds and combed out some of her hair and put it in the bathroom sink. Minor did these things “because if [she] were caught they would know that [she] was there and stuff like that.” R. 94, line 18 – R. 95, line 14.⁴

Although Minor’s friend picked her up, Minor was caught by police walking alone on the street on June 4, 2013. R. 96, lines 15-22; R. 131, lines 1-11. The police transported Minor to the local hospital. R. 150, lines 7-9. However, no rape kit was performed because that hospital would not perform rape kits on juveniles. R. 150, lines 10-13. When asked why the police did not take Minor to Florence where a rape kit could be done, the investigating officer responded, “Well, the time we got her was 11:00 at night. Of course the Care House was not open or Durant Center was not open. And they both require three day window of opportunity to do one. By the time we would [have] gotten her there with appointment it’d have been past, three days would have passed.” R. 150, lines 14-21.⁵ The investigating officer could not answer whether the Durant Center or Care House would open for an emergency. R. 150, lines 22-24. Further, the investigating officer opined that there would not have been any evidence anyway because Minor had bathed several times. R. 151, lines 15-25.

⁴ When Minor told the police what she claimed transpired between Appellant and her, the police executed a search warrant on Appellant’s home. R. 131, line 22 – R. 132, line 15. The police found “[a] purple fleece-type blanket ... under a bedroom on the far, on the right side of the house.” R. 136, lines 6-20; R. 137, line 21 – R. 138, line 10.

⁵ According to the indictment and Minor’s statement to police, the last sexual encounter occurred on June 2, 2013, which would have been within the three days the investigating officer claimed was required in order for the Durant Center or Care House to perform a rape kit.

ARGUMENT

The trial judge erred in allowing the introduction of testimonial and photographic evidence of firearms found in Appellant's home where the evidence was irrelevant to the charges against him and any probative value of the evidence was substantially outweighed by the danger of unfair prejudice.

Relevant facts

Prior to trial, Appellant moved to exclude evidence relating to specific items – firearms and suspected narcotics – that were seized at his home during the execution of a search warrant. Appellant explained that law enforcement seized items believed to be drugs, but subsequent testing indicated the items were not drugs. R. 38, lines 8-23. The prosecutor argued the seizure of weapons from Appellant's home and the seizure of items believed to be drugs were relevant because it corroborated portions of Minor's testimony because Minor claimed she saw guns and drugs in Appellant's home. R. 38, line 25 – R. 40, line 10.

Judge Newman noted that “[ninety-five] percent of the time hearing motions in limine is a complete waste of time because it's all based on conjecture and speculation about who is going to attempt to do what during the course of a trial, and the judge is asked to rule upon things without any foundation or information on which to make a ruling.” In “the other five percent of the cases where items are excluded then they're - - parties seeking to have excluded then poses a question that causes it to be introduced anyway.” R. 43, line 19 – R. 44, line 4. Thereafter, he appeared to refer to the doctrine of res gestae when he stated:

[O]ne of the accepted bases for the admissibility of evidence of other crimes is when such evidence furnishes a part of the context of the crime

or is necessary for the full presentation of the case or is so intimately connected with and explanation of the crime charged, and is such a part of the setting of the case in its environment that the proof is necessary in order to ... make a complete story of the crime by showing the context and the other matters be linked, linked into it, such that the items should be, the evidence should be allowed.

R. 44, lines 4-17. He concluded the existence of guns and what appeared to be marijuana may fall into the category of evidence he described. However, he found the “explanation of selling drugs” was not admissible. R. 44, lines 18-24.

During the direct examination of Minor, the prosecution sought to elicit testimony regarding what she found while plundering through Appellant’s home while he was away, and Appellant promptly objected. R. 87, lines 15-19. After excusing the jury, the judge engaged Minor in a colloquy. Minor explained that she saw “a little old fashioned police gun or something like that.” She also saw “measuring things that look like you could measure for, like cocaine or something.” When she looked behind “his” door, she saw “one of those long guns.” R. 88, lines 2-17. At the conclusion, Appellant objected on the basis of relevance and Rule 403, SCRE. R. 88, line 19 – R. 89, line 1. The prosecution argued that having a firearm is not illegal, that Appellant could elicit from law enforcement that no drugs were found in the home, and that the testimony went to explain Minor’s state of mind. R. 89, lines 3-15. Thereafter, the judge permitted the state to proffer additional questions and answers.

Minor stated that when she saw the guns she was “scared” and “called somebody to pick [her] up.” R. 91, line 23 – R. 92, line 1. Thereafter, the prosecutor argued the evidence went to Minor’s state of mind and explained the “reason why she took the actions that she took.” R. 92, lines 3-8. Judge Newman held that Minor “would be scared from seeing drugs; she might be scared from seeing a gun.” He further explained

that a gun in someone's home was not a bad act. Therefore, he sustained the objection regarding drugs because he saw no "connection between that and the issue of whether he committed rape or not." However, he concluded that "[i]f she saw guns and because she saw guns she got scared, then that's something else; but there hasn't been any sufficient showing that anything connected with the drugs made her fearful so [he] sustain[ed] that objection as to relevance." R. 92, lines 15-22.

When the jury returned, Minor testified that she saw firearms in one of Appellant's drawers and that she saw long guns behind "his" door. R. 93, line 20 – R. 94, line 7. When she saw firearms in the house, she "was just scared." "[A]t that point, she called a friend to pick her up. R. 94, lines 8-13. Additionally, Minor claimed she saw "a lot" of bullets in the home. R. 97, lines 7-13.⁶

The state called Investigator Juan Ballard as a witness.⁷ Ballard executed a search warrant on Appellant's home looking for firearms on June 5, 2013. Through Ballard, the state introduced five photographs showing firearms and ammunition. The photographs showed a bag containing shotgun shells, a dresser drawer containing a box of Remington

⁶ Appellant did not object to Minor's testimony before the jury because her objection immediately preceding the proffer and her argument sufficiently preserved the objection for review. "Generally, a motion in limine is not a final determination; a contemporaneous objection must be made when the evidence is introduced. There is an exception to this general rule when a ruling on the motion in limine is made 'immediately prior to the introduction of the evidence in question.'" State v. Wiles, 383 S.C. 151, 156, 679 S.E.2d 172, 175 (2009). Although this was not a motion in limine, the same principles apply where the introduction of the evidence immediately followed a proffer and ruling by the court without the introduction of any intervening evidence.

⁷ Appellant did not object to Ballard's testimony regarding the guns. However, Appellant was not required to object because doing so would have been futile. Appellant had objected to the introduction of evidence regarding the firearms during a pretrial hearing and had objected again during the testimony of Minor. Thus, any additional objections would have been futile. See Staubes v. City of Folly Beach, 339 S.C. 406, 415, 529 S.E.2d 543, 547 (2000).

.45 caliber ammunition, three spent rounds of .45 ammunition and a Highpoint rifle round. Additionally, the photographs showed a .22 rifle behind the door, which Ballard claimed was where Minor said it would be. Ballard also found a Highpoint firearm behind the dresser that “Minor did not see.” He also described an H&R sliver .32 caliber gun found in a drawer. R. 139, line 21 – R. 140, line 22; R. 143, line 24 – R. 144, line 15; R. 145, lines 1-25; State’s Exhibits #6-11.⁸

During closing argument, the prosecutor argued the jury could tell if a witness was truthful by examining the details. According to the prosecutor, “if you want to find out whether or not somebody is being truthful ... the devil is in the details ... because if a person really wants to tell a good lie, really good lie, then if you asked him about the details ... they’ll be only able to carry the lie up so far because they hadn’t thought it all the way through.” R. 180, line 23 – R. 181, line 7. Thereafter, the prosecutor claimed she had pressed Minor for details and Minor had delivered. R. 180, lines 11-12. Subsequently, the prosecutor argued that Minor “noticed several guns inside the home,” and “it dawned on her ... this situation is probably not good ... so she call[ed] a friend to come and pick her up.” According to the prosecutor, the police found the shotgun “exactly” where Minor said it would be. R. 187, lines 14-25.

Discussion

Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Rule 401, SCRE. Generally, “[a]ll relevant evidence is admissible.” Rule 402, SCRE. “Evidence which assists a jury at arriving at the

⁸ State’s Exhibits #6 through #11 are on file with this Court.

truth of an issue is relevant and admissible unless otherwise incompetent.” State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986)(citing Toole v. Salter, 249 S.C. 354, 361, 154 S.E.2d 434, 437 (1967)).

However, even relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” Rule 403, SCORE; see also State v. Orozco, 392 S.C. 212, 218, 708 S.E.2d 227, 230 (Ct. App. 2011). Thus, the first step requires a determination of the probative value of the evidence. The second step requires an evaluation of the danger of unfair prejudice resulting from the introduction of the evidence. The third step requires balancing of the probative value and unfair prejudice. “When juxtaposing the prejudicial effect against the probative value, the determination must be based on the entire record and will turn on the facts of each case.” State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008). Unfair prejudice means an undue tendency to suggestion a decision on an improper basis, commonly, but not necessarily, an emotional one. Orozco, 392 S.C. at 218, 708 S.E.2d at 230 (citing State v. Cheeseboro, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001)); see also State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991)(providing that “[e]vidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one”).

The evidence that Minor saw firearms and ammunition in Appellant’s home was irrelevant to the charges against Appellant. Minor never claimed Appellant used the firearms, threatened to use the firearms, or even spoke to her about the firearms. The presence of the firearms in his home was completely irrelevant to whether he committed criminal sexual conduct because the firearms did not make any fact concerning the charge more or less probable. Whether Appellant had guns was not a fact of any consequence in

the trial. Although the prosecution and the judge claimed Minor seeing the guns went to her state of mind, the issue of her state of mind was not before the jury. None of the elements of the charged offenses required proof of Minor's state of mind. Traditionally, "state of mind" is an exception to the rule against hearsay. Appellant's objection was not to hearsay and Minor seeing the guns was not hearsay. If Minor's state of mind were relevant at all, then the prosecution could have simply elicited that Minor became scared, not that she was scared because she saw firearms and ammunition.

To the extent Minor's testimony about the firearms and law enforcement's finding of the firearms during the execution of the search warrant served to corroborate Minor's testimony, the probative value was very low. As an initial matter, Appellant never disputed that Minor was present in his home. R. 59, line 1 – R. 61, line 14 (Appellant's opening statement admitting Appellant Minor up and took her to his home in an attempt to assist her); R. 195, line 11 – R. 196, line 20 (Appellant's closing argument admitting Minor was in his home). Therefore, corroborating Minor's testimony that she was at Appellant's home was an undisputed fact. Additionally, Minor's testimony that she was in Appellant's home was corroborated by the police finding the purple fleece blanket where Minor said it would be. Thus, the need to corroborate Minor's story was very low rendering the probative value of the firearms very low.

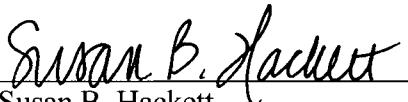
The danger of unfair prejudice resulting from the introduction of evidence that Appellant possessed multiple firearms and ammunition cannot be overstated. While possession of firearms is not illegal, firearms are associated with many illegal activities, such as armed robberies. Additionally, firearms are often used to effectuate the commission of crimes. Placing firearms in Appellant's home and within his reach during the times that

Minor claimed she was sexually assaulted by Appellant unfairly prejudiced Appellant in the eyes of the jury. This danger of unfair prejudice substantially outweighed any probative value of the firearms when considering the entire record, which included the undisputed fact that Minor was present in Appellant's home and other evidence corroborating Minor's testimony that she was present in Appellant's home.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and remand for a new trial.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 10th day of July, 2015.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Williamsburg County

Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

FARON M. CLEMENTS,

APPELLANT

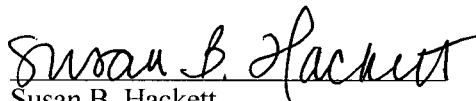
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Faron M. Clements states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge Clifton Newman, which was held on October 16, 2014, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Faron M. Clements.

Respectfully submitted,


Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 10th day of July, 2015.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Williamsburg County

Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

FARON M. CLEMENTS,

APPELLANT

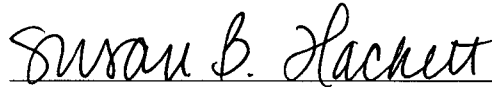
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) Transcript dated September 17, 2014
- (2) Trial transcript dated October 13, 2014
- (3) State's Exhibit # 6 (photo of ammunition)
- (4) State's Exhibit # 7 (photo of contents of drawer)
- (5) State's Exhibit # 8 (photo of bathroom with gun)
- (6) State's Exhibit # 9 (photo of gun behind door)
- (7) State's Exhibit # 10 (photo of handgun)
- (8) State's Exhibit # 11 (photo of gun in drawer)
- (9) Amended true-billed indictment;
- (10) Sentence sheets

I certify that this designation contains no matter which is irrelevant to this appeal.

July 10th, 2015



Susan B. Hackett
Appellate Defender

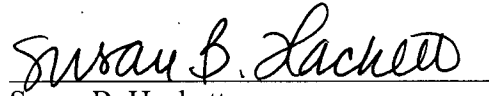
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

July 10, 2015



Susan B. Hackett
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-15

RECEIVED

JUL 10 2015

SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Williamsburg County

Clifton Newman, Circuit Court Judge

RECEIVED

JUL 10 2015

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

FARON M. CLEMENTS,

APPELLANT

CERTIFICATE OF SERVICE

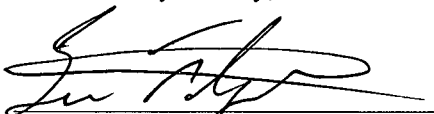
The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Faron M. Clements, #298780 at Evans Correctional Institution, 610 Hwy. 9 West, Bennettsville, SC 29512, this 10th day of July, 2015.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 10th day of July, 2015.



(L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.