THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of General Sessions

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SC Court of Appeals

Lee S. Alford, Circuit Court Judge

Case No. 2012-GS-46-04105

Lynne Smith Saucier ....Appellant,

v.

State of South Carolina..Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

DID THE CIRCUIT COURT ERR IN EXCLUDING EVIDENCE OF A PRIOR CIVIL SUIT AND JUDGMENT BETWEEN THE APPELLANT AND ALLEGED VICTIMS BASED ON THE GROUNDS OF RELEVANCY, CONFUSION, AND WASTE OF TIME?

STATEMENT OF THE CASE

On April 12, 2012, Appellant was arrested and charged with Discharge of a Firearm in an Unincorporated Area of the County. At some point later, this charge was dropped and Appellant was charged with Pointing and Presenting a Firearm. Appellant's case was tried before a jury in a three-day trial from August 27, 2013 - August 29, 2013. Prior to opening statements, counsel for Appellant sought the introduction of statements and evidence relating to a previous civil suit between the Appellant and Robert and Carol Jones, her neighbors, and subsequent civil judgment in favor of Appellant. Over Appellant's objections, the Honorable Lee S. Alford excluded the use of this evidence on the grounds that it was not relevant, it would confuse the jury, and it would waste judicial time.

On August 27, 2013, Appellant was convicted of Pointing and Presenting a Firearm and sentenced of commitment to the State Department of Corrections for a determinate term of five years provided the sentence is suspended with probation for five years. Appellant filed a timely Motion for a New Trial with the Clerk of Court on September 10, 2013 seeking a new trial based on the trial Court's failure to grant Appellant's motion for directed verdict, the jury verdict unsupported by the evidence, and the improper exclusion of evidence. A filed copy of this motion was mailed to the Honorable Lee S. Alford on September 24, 2013 and received by the Court on September 26, 2013.

On October 8, 2013, Appellant, through counsel, received written notice of Judge Alford's Order denying Appellant's Motion for a New Trial. Appellant filed a timely notice of appeal with the Court of Appeals on or about October 14, 2013. This appeal follows.

FACTS

Appellant, Lynne Saucier, resides in York County, South Carolina on California Road. Appellant has resided at this sixteen-acre farm since 1998. (R. p. 176). Carol and Robert Jones reside next door to Appellant with an adjoining property line. (R. p. 177). Appellant and her neighbors have had a long and tumultuous relationship involving unfounded criminal charges initiated by Carol and Robert Jones and a successful malicious prosecution, abuse of process, and defamation civil suit against the Jones.

In 2009, the Jones falsely accused Appellant of firing at them and charged her with Assault and Battery of High and Aggravated Nature. Appellant was arrested and the charge was ultimately dismissed. Appellant initiated a civil suit against the Jones for malicious prosecution and abuse of process, which resulted in a $35,000 verdict in favor of Appellant on March 22, 2012.

Less than two (2) weeks later on April 2, 2012, Appellant was at her home rehabbing a shoulder surgery. (R. p. 178). Appellant was in her driveway trying to start her Ford truck when she noticed the Jones' worker, Robert Rainey, watching her from the Saucier-Jones property line. (R. pp. 179-180). Appellant left to run some errands in her Dodge truck, but returned to find Mr. Rainey and Ms. Carol Jones at the property line staring at her. (R. p. 180). Despite her not uncommon audience, Appellant continued to work on one of her trucks in the driveway. (R. pp. 182-183).

Appellant, an avid and lawful gun owner, removed some jumper cables and her shotgun from one of her trucks. (R. p. 183). Frustrated with her inability to start the first truck, Appellant cursed and fired her shotgun straight up into the air from her driveway. (R. p. 183). Appellant fired her shotgun from the same place in her driveway where she regularly fired her shotgun and shoots skeet. (R. p. 183). Appellant fired the shotgun up into the air. She was unable to fire the shotgun from her shoulder as one normally fires a shotgun because of her shoulder surgery. (R. p. 184). In frustration, Appellant fired two shots up into the air as she walked back to her Ford truck. (R. p. 184).

At no point during this incident did Appellant threaten Mr. Foy, Mr. Rainey, Ms Jones or anyone at the property line watching her. (R. p. 186). Appellant never fired the shotgun in the direction of the witnesses. (R. p. 186). Appellant actually fired the shotgun in the air in the direction opposite of the neighbors staring down below at the property line. (R. p. 186). There is no question that both the State of South Carolina and York County permit one to shoot a firearm on one's property so long as it is done in a safe manner. (R. p. 164).

ARGUMENTS

I. BECAUSE THE TRIAL COURT JUDGE EXCLUDED EVIDENCE RELATING TO PREVIOUS CIVIL SUIT AND JUDGMENT BETWEEN THE APPELLANT AND ALLEGED VICTIMS BASED ON THE GROUNDS OF RELEVANCY, CONFUSION AND WASTE OF TIME, THE CIRCUIT COURT ERRED BY IMPROPERLY EXCLUDING ADMISSIBLE EVIDENCE.

A. Relevancy

At her criminal trial, Appellant was unduly prejudiced by the trial court judge's pre-trial refusal to permit Appellant to introduce evidence of the alleged victims' and the state's

key witness' animosity towards Appellant. As a preliminary matter, Rule 402, SCRE provides that "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible." "Relevant evidence" is further defined in Rule 401, SCRE as "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."

In the case at hand, Appellant, both in chambers and in pretrial motions sought the ability to produce evidence, both testimonial and via civil court orders, showing a long-standing tumultuous relationship between Appellant and her neighbors. In short, Appellant wished to introduce evidence regarding the previous lawsuit involving the Jones, the outcome of the lawsuit and other information surrounding her tumultuous relationship with the Jones. Although counsel for Appellant made arguments to introduce this evidence in chambers, the trial judge deliberated and made his ruling on the record prior to the start of the trial. In his ruling, the Honorable Lee S. Alford determined that no such evidence on the prior civil suitor judgment in favor of Appellant would come in. (R. pp. 64-65).

Here, the trial court judge did find that the proffered evidence was at least "tangenially" relevant, but excluded it anyway. (R. p. 65). The trial court judge failed to recognize that evidence of a prior civil suit and unfavorable judgment is extremely relevant to show both bias and motive on the part of the Jones and the State's key witness, Barry Foy, who was the Jones' son-in-law. In fact, the State's case-in-chief relied almost entirely on the

testimony of Barry Foy, a neighbor and son-in-law of Robert and Carol Jones. (R. pp. 94-95). Moreover, Barry Foy, his mother-in-law, Carol Jones and one of their workers, Robert Rainey were the only witnesses to the alleged incident which the State contends constitutes the Pointing and Presenting charge.

Although Judge Alford correctly points out that a prior civil suit may not be directly relevant to the act of pointing and presenting, it is still relevant under Rules 401, 402 SCRE because it has a tendency to make the existence of facts that are of consequence to the determination of the present action more probable or less probable than they would be without the evidence. Specifically, evidence of the prior civil suit and judgment in favor of Appellant is directly relevant to the credibility, bias and motive of the Jones and testifying witness, Barry Foy. Without the ability to question witnesses about the prior civil suit, Appellant was prejudiced by her inability to question Mrs. Jones and Mr. Foy's credibility, bias or motive.

Contrary to Judge Alford's ruling deeming this evidence "tangenially" relevant, a party is permitted to impeach a witness with even irrelevant matters. "Considerable latitude is allowed in the cross-examination of a witness (always within the control and direction of the presiding judge) to test the accuracy of his memory, his bias, prejudice, interest, or credibility. In doing so the witness may be asked questions in reference to irrelevant matter, or in reference to prior statements contradictory of his testimony, or in reference to statements as to relevant matter not contradictory of his testimony." *State v. Thompson*, 110 S.E. 133, 134 (S.C. 1921). If Appellant had been able to introduce evidence of the civil suit judgment or otherwise cross-exam Mrs. Jones and Mr. Foy on the subject, Appellant would

have been able to impeach Mrs. Jones and Mr. Foy's credibility. In addition, Appellant would have been able to show that Mr. Foy and the Jones colluded and fabricated their story in order to seek retribution from Appellant for her civil suit victory.

B. Confusion

The trial judge erred by refusing to allow evidence of the prior civil suit under Rule 403, SCRE on the ground of confusion. During pretrial motions, Judge Alford ruled that the evidence would confuse the jury. (R. p. 67). It appears that Judge Alford made this conclusion based on the differing burdens of proof between civil and criminal trials. However, this is hardly a basis for confusion in any criminal trial. It is hard to imagine a single criminal trial where at least defense counsel, if not both, discuss the difference between "preponderance of the evidence" standard and "beyond a reasonable doubt" standard.

In fact, the distinction was explained to the jury at least five times in this trial. The trial judge instructed the jury of the state's burden of proof beyond a reasonable doubt in his opening remarks. (R. p. 77). Counsel for Appellant later explained the differing burdens of proof in his opening statement. (R. p. 89). Counsel for Appellant again explains this distinction in his closing argument. (R. p. 222). Counsel for the State even discussed the heightened beyond a reasonable doubt standard in his closing argument. (R. pp. 226-227). Most importantly, the judge, in his jury charge, specifically explained the preponderance of the evidence standard and distinguished it from the beyond a reasonable doubt standard. (R. pp. 240-241). These are the very same, simple jury instructions criminal trial courts rely on daily to instruct the jury on the proper burden of proof. If these instructions are sufficient for

jury charges, they should also sufficiently quash any potential confusion from the introduction of Appellants civil trial involving the alleged victims. In other words, even if there was some slight confusion, it could be easily wiped away by a very simple curative instruction.

Furthermore, the trial judge misapplied Rule 403. Rule 403 provides that relevant evidence "may be excluded if its probative value is *substantially outweighed* by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." (Emphasis added). Rule 403 does not bar relevant evidence because there is *some confusion* or even when there is a *great deal of confusion*. Rather, Rule 403 permits a trial judge to exclude relevant evidence if and only if the probative value is substantially weighed by the danger of confusion of the issues. The seemingly "some confusion" finding by the trial judge does not even trigger a judge's discretion to bar relevant evidence.

Under the same 403 analysis, the incredible probative value of this evidence cannot be ignored. Because the State's primary witness was related to the losers of the civil suit with Appellant, this impeachment evidence was the only evidence available to demonstrate Mr. Foy's credibility, motive and bias. Appellant had no other opportunity to draw out the witness' bias towards Appellant. Appellant had no other way to show the jury that these parties have sought false and malicious unfounded charges against Appellant in the past. Accordingly, the trial judge abused his discretion when excluding evidence of Appellant's civil suit and civil judgment on Rule 403 grounds of confusion.

C. Waste of time

The trial judge also appears to have excluded the use of the same evidence under Rule 403 on the grounds that the same would be a waste of time. (R. p. 69). As discussed in detail above, the proper 403 inquiry is not whether there is some waste of time or great waste of time, but rather whether any waste of time *substantially outweighs* the probative value of the proffered relevant evidence. In making his pre-trial ruling, it appears that Judge Alford focused on the need to re-try the failed criminal case against Appellant which led to the $35,000 civil verdict in favor of Appellant. In doing so, Judge Alford's attention was misplaced. Appellant needed only to introduce a certified copy of the civil judgment in order to impeach Mr. Foy as to his possible motive or bias. Although Judge Alford noted the waste of time in educating the jury on the differing burdens of proof, this was already done throughout the trial and again in Judge Alford's jury charge. (R. p.p. 70; 240-241).

II. The trial Judge should have granted a directed verdict for the defendant.

The standard for a directed verdict requires that "a defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." *State v. Lane*, 406 S.C. 118, 121, 749 S.E.2d 165, 167 (Ct. App. 2013) (quoting *State v. Brannon*, 388 S.C. 498, 501, 697 S.E.2d 593, 595 (2010)). The state must produce evidence of each element of the offense. Under Rule 19(a) of the South Carolina Rules of Criminal Procedure, "the court shall direct a verdict in the defendant's favor on any offense charged in the indictment after the evidence on either side is closed, if there is a failure of <u>competent</u> evidence tending to prove the charge in the indictment."

In this case, the defendant was charged with pointing and presenting a firearm in violation of South Carolina statute 16-23-410. The statute requires that the firearm must be pointed or presented at a person.

It is clear from video that the defendant did not point or present the firearm at any person. The video shows the defendant discharging the firearm three times. The position (presentation) of the weapon for first two discharges is obscured by trees and other foliage. In the third discharge, the weapon is held with the muzzle upward and to the right (witness' view) of the witness. It was neither pointed nor presented at the witness.

The testimony of the defendant, while somewhat contradictory, is not relevant under these circumstances. The witness made the video and it is a clear and complete account of what happened. Any testimony is merely his opinion or characterization of the event.

Mr. Foy testified he felt threatened .This is not a relevant consideration or competent evidence see *In RE Spenser R. 692 SE 2d 2056, 387 SC 517 (2010)* Mr. Foy testified that the shot gun was angled towards him. "Leaned the gun toward us and then shot" (R. p. 104). The angle of the gun was not competent evidence see *In Re Spenser R. (supra)* (This same testimony i.e. feeling threatened and an angled firearm was rejected as proof of presenting as to Mrs. L in *In Re Spenser R. (supra)*).

In fact the witness' testimony about feeling threatened and the angled firearm was not truthful and is clearly contradicted by the video. He stated that he felt

threatened and "...getting the gun to shooting it straight up in the air and then turning in our direction **and shooting at an angle over us**" (Emphasis added) (R. p. 113). The video, it fact shows that the gun was not discharged over Mr. Foy but up and to his right presenting no danger to Mr. Foy.

Therefore, there was no competent evidence of threatening or menacing at the witness and the video clearly shows that the weapon was not presented at Mr. Foy. The case should have been dismissed at the directed verdict motion.

III. The Judges charge to the jury defining the crime charged was contradictory and confusing and deprived the defendant of a fair trial.

The judge's charge was as follows:

> In this case the defendant is charged with pointing and presenting a firearm. Section 16-23-410 of the South Carolina Code provides as follows: It is unlawful for a person to present or point at another person a loaded or unloaded firearm. The State must prove beyond a reasonable doubt the elements of pointing and presenting a firearm.
>
> **The elements are: First that the defendant pointed or presented; second, a loaded or unloaded firearm; third, at another person.**
>
> **Now, the defendant must have committed some action with regards to a firearm that amounts to pointing or presenting. To present is to show in a threatening manner.** The item which was pointed or presented must have been a firearm. It is not necessary that the firearm was loaded with ammunition of some kind. The firearm may be loaded or unloaded. **The defendant must have pointed or presented the firearm at another person. (R. pp. 256-260).**

In stating the elements of the offense, the court notes that one of the required elements is that the pointing or presenting must be "at another person" *(State v Burton 356 S.C. 259 (2003), 589 S.E.2d 6).*

The confusion arises when the judge also charged that the defendant must have "**committed some action** with regards to a firearm **that amounts to** pointing and

presenting". This is incorrect as the statute requires that the weapon must be presented at someone. The charge as given allows for some lesser action such as pointing or presenting in the general direction or near etc. (In this case the video shows the defendant discharging the weapon directly up in the air (twice) and over and to the right of the witness (once)).

This was particularly prejudicial because the witness Foy never testified that the defendant pointed or presented at him (R. p. 104, line 8 "[she] leaned it towards us", R. pp. 127-128 "she actually pointed and leaned it towards us") (see testimony Q. "But the gun is not pointed at you." A. "Not directly, no." R. pp. 144-145).

IV. The judge should have acted as the "Thirteenth Juror" and granted a new trial based solely on the facts because the evidence does not justify the verdict.

South Carolina's thirteenth juror doctrine is well established as the standard for granting a new trial in state law actions. *See Folkens v. Hunt*, 300 S.C. 251, 387 S.E.2d 265 (1990); *Sorin Equipment Co., Inc. v. The Firm, Inc.*, 323 S.C. 359, 474 S.E.2d 819 (Ct. App. 1996). South Carolina's thirteenth juror doctrine allows the trial judge to sit, in essence, as the thirteenth juror when he finds "the evidence does not justify the verdict," and then to grant a new trial based solely "upon the facts." *Id.* at 254, 387 S.E.2d at 267 (citing *South Carolina State Highway Dep't v. Townsend,* 265 S.C. 253, 217 S.E.2d 778 (1975)).

This doctrine also exists in criminal cases Rivera v Newton, 401 S.C. 403, 737 S.E.2d 193 (2012) (S.C. Court of Appeals #5055 Decided 11/21/12).

thousand dollars." In the video of her actions, she fired her shotgun directly up into the air twice and a third time fired her shot gun at an angle over and to the right of the witness.

The witness Foy testified that he felt threatened and equivocated as to whether the weapon was pointed at him, at one point saying the weapon was presented.

The video, taken by Foy, is very clear. The gun was neither pointed nor presented at him. His testimony that he felt threatened was irrelevant (see *In Re Spenser R supra*). (See the findings as to the conduct of Mrs. L who "felt threatened").

The video clearly shows that the weapon was neither pointed nor presented at Mr. Foy. The evidence did not justify the verdict and the court should have granted a new trial.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court and remand for a new trial.

Respectfully submitted,

June 16, 2014

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Lynne Smith Saucier .... Appellant,

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State of South Carolina .... Respondent.

PROOF OF SERVICE

I, Stacy Davis, do hereby certify that on this 17 day of June, 2015, I served upon the below named Respondents copies of the **FINAL BRIEF OF APPELLANT** by depositing copies of the same via U.S. Mail, postage prepaid, Registered Mail in an envelope addressed as set forth herein below:

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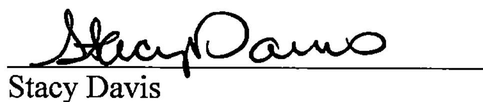

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June 17, 2015
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June 17, 2015

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
P.O. Box 11629
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Re: State of South Carolina vs. Lynne Smith Saucier
Appellate Case No.: 2013-002227

Dear Ms. Kitchings:

Enclosed please find for filing the Final Brief of Appellant along with a Proof of Service for the same.

Thank you for your consideration of this letter.

Sincerely,

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