ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Hampton County

Brooks P. Goldsmith, Circuit Court Judge

Opinion No. 2015-UP-564 (S.C. Ct. App. filed 12/23/2015)

2013-GS-25-0433

THE STATE,

RESPONDENT,

V.

TONYA MCALHANEY,

PETITIONER.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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INDEX

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on 2/16/2016.

QUESTION PRESENTED

Whether the Court of Appeals erred by holding the trial court did not abuse its discretion in admitting evidence of Petitioner's subsequent November 24, 2013 burglary arrest during her trial for the November 23, 2013 burglary, under the common scheme or plan and identity exceptions to Rule 404(b), SCRE, and res gestae theory, because the subsequent burglary on November 24th was not part of a common scheme or plan, was not inextricably entwined with the prior burglary, and it denied Petitioner a fair trial particularly where the subsequent burglary indictment was quashed?

STATEMENT OF THE CASE

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

After a two-day trial, the jury found Petitioner guilty. R. 298, lines 11- 16. Judge Goldsmith sentenced her to fifteen years imprisonment. R. 299, lines 12 – 19. Petitioner appealed her guilty plea and sentence.

On December 23, 2015, the South Carolina Court of Appeals affirmed Petitioner's conviction and sentence in an unpublished opinion. State v. McAlhaney, Op. No. 2015-UP-564 (S.C. Ct. App. filed in December 23, 2015); App. 1 – 2. Petitioner filed a petition for rehearing on January 7, 2016. App. 3. On February 16, 2016, the Court of Appeals denied the petition. App. 8.

This petition for writ of certiorari follows.

ARGUMENT

The Court of Appeals erred by holding the trial court did not abuse its discretion in admitting evidence of Petitioner's subsequent November 24, 2013 burglary arrest during her trial for the November 23, 2013 burglary, under the common scheme or plan and identity exceptions to Rule 404(b), SCRE, and res gestae theory, because the subsequent burglary on November 24th was not part of a common scheme or plan, was not inextricably entwined with the prior burglary, and it denied Petitioner a fair trial particularly where the subsequent burglary indictment was quashed.

Motion to Exclude the November 24, 2014 Burglary

Defense counsel for Petitioner 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 Petitioner. He explained that the burglary on November 24th and the burglary on November 23rd, for which Petitioner 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), SCRE. He

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

explained that because there was one big investigation and Petitioner gave consent to search her home, Petitioner'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 Petitioner'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.

Trial

Petitioner 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 Petitioner in one of the bedrooms. R. 129, lines 8 – 20.

Officer Ginn arrested Petitioner and drove her to the police station. R. 130, lines 3 – 22. Petitioner 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 Petitioner'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 Petitioner's home when police arrived. R. 148, lines 1 – 2. Sauls admitted to burglarizing 108 Plywood Street with Petitioner 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 Petitioner 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 Petitioner 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, Petitioner, and Hair all went inside of the house. R. 158, line 3. He admitted to taking knives and liquor but could not remember whether Petitioner 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 Petitioner come out with pills, however. R. 166, line 25.

Court of Appeals

On appeal, Petitioner argued to the Court of Appeals that evidence of the November 24, 2013 burglary was inadmissible under the common scheme or plan and identity exceptions to Rule 404(b), SCRE. Petitioner asserted that evidence of the November 24, 2013 burglary was further inadmissible because the trial judge quashed the indictment.

Petitioner further argued to the Court of Appeals that defense counsel moved for a continuance based on the fact that the trial judge quashed the indictment **after** the solicitor read the indictment to the jury. The trial judge denied the motion for a continuance but failed to give a limiting instruction to the jury regarding the November 24, 2013 burglary.

The Court of Appeals affirmed Petitioner's conviction and sentence. App. 1 – 2. In a summary opinion, the Court held that evidence of the November 24, 2013 burglary was admissible under Rule 404(b) and res gestae. See App. 2.

Petition for Rehearing

Petitioner filed a petition for rehearing. Petitioner argued to the Court of Appeals that evidence of the November 24, 2013 burglary was not "so intimately connected with" the November 23, 2013 burglary that its "admission [was] necessary for a full presentation of the case." Anderson v. State, 354 S.C. 431, 435, 581 S.E.2d 834, 836 (2003). Petitioner asserted that, because of the detailed testimony from Ricky Sauls about the alleged burglary on November 23, 2013, the State could present its case against Petitioner without admitting any evidence of the November 24, 2013 burglary. See App. 4.

Petitioner further argued to the Court of Appeals that the November 24, 2013 burglary was also inadmissible under Rule 403, SCRE. See App. 5; State v. Dennis, 402 S.C. 627, 636, 742 S.E.2d 21, 26 (Ct. App. 2013). Because Petitioner was arrested in the same house in which the

alleged burglary occurred the day before, any probative value the November 24, 2013 had, if at all, was substantially outweighed by its prejudicial effect. See App. 5. The lack of a limiting instruction from the trial judge compounded the unfair prejudice against Petitioner.

Discussion

The Court of Appeals erred by holding the trial court did not abuse its discretion in admitting evidence of Petitioner's subsequent November 24, 2013 burglary arrest during her trial for the November 23, 2013 burglary, under the common scheme or plan and identity exceptions to Rule 404(b), SCRE, and res gestae theory. The subsequent burglary on November 24th was not part of a common scheme or plan, was not inextricably entwined with the prior burglary, and it denied Petitioner a fair trial, particularly where the subsequent burglary indictment was quashed.

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.

Petitioner 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 Petitioner was found inside the house on November 24th and was alleged to have been inside the house on November 23rd. They were two separate incidents which were not inextricably entwined.

Evidence from the November 24th incident was not necessary to prove Petitioner committed the burglary on November 23rd. The testimony from Sauls alone identified Petitioner as participating in the November 23rd burglary. The fact that Petitioner'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 Petitioner 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 Petitioner 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

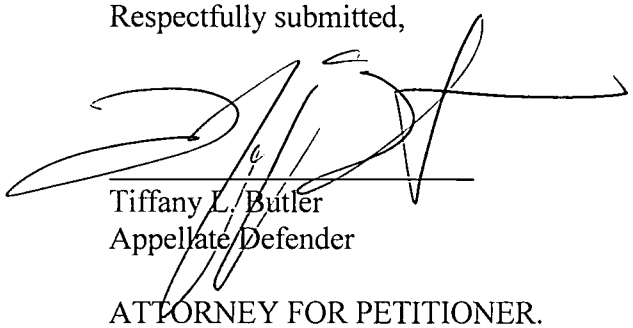
indictment. In fact, defense counsel moved for a continuance for that same reason – the jury heard that Petitioner had been indicted for another burglary.

The November 24th burglary had absolutely no probative value and should not have been admitted into evidence. Even if the evidence did have probative value, it was substantially outweighed by prejudicial effect. Because this evidence was admitted, Petitioner was unfairly prejudiced and denied a fair trial.

CONCLUSION

For the foregoing reasons, Petitioner Tanya McAlhaney requests this Court to reverse the Court of Appeals' decision affirming her conviction and sentence and remand to the lower court for a new trial.

Respectfully submitted,



Tiffany L. Butler
Appellate Defender

ATTORNEY FOR PETITIONER.

This 17th day of March, 2016

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THE STATE,

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CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Megan Harrigan Jameson, Esquire, the S.C. Court of Appeals, and Tonya Mcalhaney at the Leath Correctional Institution, 2809 Airport Road Greenwood, SC 29649 this 17th day of March, 2016.

Tiffany L. Butler
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 17th day
of March, 2016.

Christian Ford (L.S.)

Notary Public for South Carolina
My Commission Expires: March 1, 2026