

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY

Court of General Sessions

The Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2015-001072

RECEIVED
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SC Court of Appeals

THE STATE,

Respondent,

v.

EDWARD RODRIGUEZ ANTHONY,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

I.

The trial judge properly admitted evidence of Appellant's three prior instances of shoplifting where the testimony concerning Appellant's prior instances of shoplifting, during which Appellant employed the same *modus operandi*, clearly established a common scheme or plan, and the probative value was not substantially outweighed by the risk of unfair prejudice.

STATEMENT OF THE CASE

Appellant was indicted during the July 2014 term of the grand jury for Aiken County for shoplifting (2014-GS-02-0100). Appellant proceeded to a trial by jury from April 14-15, 2015, in Aiken, South Carolina before the Honorable R. Lawton McIntosh. At the conclusion of trial, Appellant was found guilty as indicted. He was sentenced by Judge McIntosh to imprisonment for a term of six years suspended on forty-five months active service with five years of probation. Appellant timely filed a notice of appeal and subsequently submitted a brief. This Brief of Respondent follows.

STATEMENT OF FACTS

From July of 2013 to August of 2014, Patsy Singletary-Siso was employed in the loss prevention department at the Belk Department Store in North Augusta, South Carolina. Tr. pp. 93-94. Singletary-Siso explained that loss prevention employees are tasked with preventing shoplifting. Tr. p. 94. On March 16, 2014, Singletary-Siso noticed Appellant enter the Belk store. Tr. p. 98. Singletary-Siso immediately recognized Appellant, as she had observed Appellant on three prior occasions enter the store, select several Polo items, go into the men's dressing room, exit the dressing room without the items, and immediately exit the store. Tr. pp. 99-100. Singletary-Siso testified the three previous incidents were in the evening, which she noted is a preferred time for shoplifting due to fewer sales associates working and easier access to the dressing rooms. Tr. pp. 100-101.

Singletary-Siso was unsuccessful in detaining Appellant on the first three occasions because he was able to exit the store so quickly. Tr. p. 100. After the second occasion where Singletary-Siso was unable to stop Appellant, she went into the inventory system and saw they were missing several Polo shirts but had not sold any. Tr. p. 104. Singletary-Siso testified the shirt Appellant was wearing on March 16, 2014 was one of the shirts she previously witnessed Appellant select and exit the store without paying for and later confirmed was missing after checking the inventory. Tr. p. 104.

When Appellant entered the store on March 16, 2014, Singletary-Siso once again observed him walk immediately into the men's department, select several pairs of jeans and several polo shirts, and enter the men's dressing room. Appellant subsequently emerged from the dressing room without any items. Upon seeing Appellant exit without the merchandise, Singletary-Siso had an associate check the dressing room for the merchandise. Tr. p. 107. Once

the associate confirmed there was no merchandise in the dressing room, Singletary-Siso contacted the police. Tr. pp. 106-107. Singletary-Siso noted Appellant had a bulge in the front of his sweatshirt as he walked out of the dressing room. Tr. p. 107. As Appellant got to the door, the North Augusta Police department arrived at the exit. Tr. p. 107. Appellant immediately turned around and walked to the side back wall of the men's department. Tr. p. 107. As Singletary-Siso moved towards Appellant, she observed him removing articles of clothing. Tr. p. 107.

Singletary-Siso and an associate retrieved the items dropped by Appellant. Tr. p. 109. Singletary-Siso photographed the items and made a receipt for the items pursuant to store policy. Tr. p. 109. Singletary-Siso testified the polo shirts dropped by Appellant had holes from where Appellant removed the EAS alarms from the shirts. Tr. p. 110. Singletary-Siso explained the higher end merchandise is typically tagged with the EAS alarms because the alarms beep when the item is taken out of the store. Tr. p. 110. The EAS tags were on the floor next to the clothing Appellant discarded. Tr. p. 111.

Officer Daniel Smith was dispatched to the Belk in North Augusta in reference to a shoplifting on March 16, 2014. Tr. p. 157. Officer Smith is employed as a public safety officer by the North Augusta Department of Public Safety. Tr. p. 156. When he arrived at the Belk, Officer Smith noticed an individual matching the suspect's description approach the doors of the store, open the door and step outside, and immediately re-enter the store once he noticed Officer Smith. Tr. p. 158. Officer Smith testified that loss prevention pointed out the suspect as he entered the store. Tr. p. 158. After he came into contact with Appellant, Appellant immediately raised his hands and his shirt and yelled, "I didn't do nothing." Tr. p. 159. Appellant told Officer Smith, "I ain't got nothing, you can check my underwear." Tr. p. 159.

Following Appellant's consent to search his person, Officer Smith located a pair of adjustable channel-lock pliers and a magnet in the pocket of Appellant's pants. Tr. p. 160. Appellant became combative and boisterous and would not comply with the commands of Officer Smith and two other officers who arrived at the scene. Tr. p. 160. After obtaining Singletary-Siso's statement and viewing video surveillance, Officer Smith determined there was probable cause to arrest Appellant for shoplifting. Tr. p. 161. Upon being informed he was being placed under arrest, Appellant began to yell and grabbed a chair and refused to release it. Tr. p. 164. Officers eventually were forced to resort to deploying a Taser to get Appellant to comply. Tr. pp. 164-65. Appellant later refused to enter Officer Smith's patrol vehicle. Tr. p. 165. Officers eventually delivered another stun burst from a Taser to get Appellant in the vehicle. Tr. p. 166. Officer Smith determined that, due to his combative nature, Appellant needed to be transported directly to the Aiken County Detention Center for his safety and that of the officers. Tr. p. 167. On the way to the detention center, Appellant stated, "Could have would have thought about it was not the same as shoplifting." Tr. p. 167. Officer Smith did not interrogate Appellant at any point. Tr. p. 168.

ARGUMENT

I.

The trial judge properly admitted evidence of Appellant's three prior instances of shoplifting where the testimony concerning Appellant's prior instances of shoplifting, during which Appellant employed the same *modus operandi*, clearly established a common scheme or plan, and the probative value was not substantially outweighed by the risk of unfair prejudice.

Relevant Facts

During a pre-trial hearing, Singletary-Siso testified regarding details of the shoplifting. Tr. pp. 52-59. She explained she observed Appellant shoplifting on three prior occasions where Appellant deployed the same *modus operandi* as he did on March 16, 2014. Tr. p. 54. Singletary-Siso observed Appellant twice through video surveillance and observed him once while she was patrolling the Belk store. Tr. p. 55. She noted Appellant was "really quick, you know. He's in and out before I could even get to the floor." Tr. p. 68. Singletary-Siso testified that on all three prior occasions, Appellant came in during the evening, which is when the majority of the store employees are not on duty. Tr. p. 55. On the evening of March 16, 2014, Appellant entered the store after 6:00 P.M. Tr. pp. 55-56. On all three prior occasions as well as on March 16, 2014, Appellant was wearing an oversize sweatshirt, baggy jeans, and a polo shirt. Tr. p. 56. Singletary-Siso noted Appellant's pattern remained consistent: he would immediately enter the men's department, cross over to the Polo section, quickly select items without looking at size or price, conceal those items with another piece of clothing, and enter the fitting room. Tr. p. 56.

The trial judge later asked Singletary-Siso whether she took any action to determine whether the inventory had changed following the previous incidents. Tr. p. 68. Singletary-Siso replied she checked the inventory and had ascertained that the particular shirt Appellant was wearing on March 16th was one she noticed him shoplift previously and the inventory check

confirmed that none of those shirts were sold. Tr. p. 69. Singletary-Siso did not notify law enforcement when Appellant committed the prior instances of shoplifting because she only contacts law enforcement if the shoplifter has not exited the store yet or is in the custody of loss prevention. Tr. pp. 71; 73. The trial judge found:

My concern when we left out before the lunch break was that it's just whether or not there's clear and convincing evidence that the crimes had occurred. Looking at the elements of the statute for clarification - - I say crimes, prior bad acts - - my leaning was they there were not admissible. I think that they are admissible. I think they constitute a clear and convincing evidence of a common scheme or plan in that they were committed in the same way. They were in the same part of the store, involving the same merchandise and witnessed by the same witness. Therefore, I think the State has established that it's clear - - by clear and convincing evidence the common scheme and plan, although it clearly is prejudicial.

Tr. pp. 73-74. The trial judge later continued:

I am - - as I was saying, I do find that the State has proved by clear and convincing evidence of these, or a common scheme or plan based on the manner in which the crimes were committed, the actual taking of the goods and that each time the concealment would follow actually a particular part of the statute in shoplifting. So I do think it's been established. It clearly is prejudicial. It's not so much more so that it should be excluded and therefore I'm going to let the prior three acts be, I'll determine that they are admissible under 404(B).

Tr. p. 76.

Discussion

Appellant asserts the trial judge erred in admitting the evidence that he shoplifted from the Belk in North Augusta on prior occasions. Specifically, Appellant contends the prior bad act evidence, "was not a common scheme or plan, was not necessary to establish Appellant's identity, had no probative value, and even if the prior bad act evidence was relevant, any probative value was substantially outweighed by its prejudicial effect against Appellant." Br. of App. p. 9. Appellant's argument lacks merit. Singletary-Sisos' testimony concerning three prior instances of shoplifting where Appellant employed the same *modus operandi* established a

common scheme or plan, and the probative value was not substantially outweighed by the risk of unfair prejudice. Additionally, the jury was presented with overwhelming evidence of Appellant's guilt.

Evidence of the Prior Shoplifting Incidents are Admissible to Show a Common Scheme or Plan.

Generally, evidence of prior bad acts is not admissible to prove a defendant's guilt for the charged crime. State v. Pagan, 369 S.C. 201, 211, 631 S.E.2d 262, 267 (2006). However, under Rule 404(b), SCRE, evidence of prior bad acts may be admissible "to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." See also State v. Lyle, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923) (recognizing evidence of other crimes is competent to prove a charged offense if it tends to establish: (1) motive; (2) intent; (3) the absence of mistake or accident; (4) common scheme or plan; or (5) identity).

In determining whether to admit evidence of prior bad acts, the trial judge must first determine if the evidence is relevant. State v. Wallace, 384 S.C. 428, 433, 683 S.E.2d 275, 277 (2009). "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears." State v. Alexander, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991); see Rule 401, SCRE (defining relevant evidence 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"). If a piece of evidence could assist the jury in arriving at the truth of an issue, it is relevant and should be admitted during trial. State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986).

After determining the prior bad act evidence is relevant, the trial judge must next determine if the prior bad act evidence falls within one of the permissible exceptions of Rule 404(b), SCRE. Wallace, 384 S.C. at 433, 683 S.E.2d at 277. One such exception is the common

scheme or plan exception, which necessitates a close degree of similarity or connection between the prior bad act and the charged offense. State v. Cutro, 332 S.C. 100, 103, 504 S.E.2d 324, 325 (1998). Regarding the common scheme or plan exception, this Court has instructed:

Such evidence is relevant because proof of one is strong proof of the other. When determining whether evidence is admissible as common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity. Where the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b).

Wallace, 384 S.C. at 433, 683 S.E.2d at 277-278. Thus, the required connection between prior bad acts and a charged offense is established by a close degree of similarity, and no further connection is required for admissibility. Id. at 434, 683 S.E.2d at 278.

In the current case, the evidence of the prior instances of shoplifting were relevant because it assisted the jury and had a tendency to make facts of consequences more probable than they would without the evidence. Significantly, the prior instances of shoplifting were extraordinarily similar to the charged offense. Appellant employed the same *modus operandi* in the prior acts of shoplifting as he did on March 16, 2014. On all four occasions, Appellant entered the store wearing baggy clothing, immediately went to the men's department, selected a stack of polo clothing without looking at size or price, entered the dressing room, and immediately moved towards the exit. This very specific method of shoplifting on all occasions constitutes a common scheme or plan. Appellant's prior bad acts, thus, contain the requisite degree of similarity and connection with the charged offense.

The Probative Value of the Prior Shoplifting Incidents Was Not Substantially Outweighed by the Threat of Unfair Prejudice.

Evidence of prior bad acts must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. See Rule 403, SCRE; State v. King, 334 S.C. 504, 513, 514 S.E.2d 578, 583 (1999). Prejudicial evidence is still proper unless

it amounts to undue or unfair prejudice. See State v. Beck, 342 S.C. 129, 136-37, 536 S.E.2d 679, 683 (2000) (“We find that evidence of the [prior bad act], although certainly prejudicial to Appellant, is not unduly so under our previous decisions.). “‘Unfair prejudice’ within its context means an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.” State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991).

The determination of the prejudicial effect of prior bad act evidence must be based on the entire record and the result generally hinges on the facts of each specific case. State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007). “Where the evidence of the bad acts is so similar to the charged offense that the previous act enhances the probative value of the evidence so as to outweigh its prejudicial effect, it is admissible.” State v. Mathis, 359 S.C. 450, 463, 597 S.E.2d 872, 879 (2004). “Stated differently, evidence which is ‘logically relevant to establish a material element of the offense charged is not to be excluded merely because it incidentally reveals the accused’s guilt of another crime.’” State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009) (quoting State v. Green, 261 S.C. 366, 371, 200 S.E.2d 74, 77 (1973)).

Due to the extreme similarities between the prior bad acts and the charged offense, the evidence had significant probative value. The evidence of the prior incidents where Singletary-Siso clearly observed Appellant employ the same very particular method of shoplifting enhanced the probative value of the evidence so as to outweigh its prejudicial effect. While the evidence against Appellant is certainly prejudicial, that prejudicial effect does not substantially outweigh the evidence’s probative value. The trial judge, thus, properly declined to exclude the evidence under Rule 403, SCRE.

Any Alleged Error in This Case is Harmless Due to Overwhelming Evidence of Appellant's Guilt

Finally, even if the trial court somehow erred in admitting Singletary-Siso's testimony concerning Appellant's prior instances of shoplifting, any alleged error in this case was harmless due to overwhelming evidence of Appellant's guilt. Error is harmless when it could not reasonably have affected the result of the trial. State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990). The key factor for determining whether a trial error constitutes reversible error is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." State v. Tapp, 398 S.C. 376, 728 S.E.2d 468 (2012) (citations and internal quotations are omitted)." Singletary-Siso testified that she observed Appellant enter the store, go directly to the men's department, grab a stack of clothing without looking at size or price, and enter the dressing room. Upon Appellant's exit from the dressing room, Singletary-Siso had an associate confirm Appellant did not leave any of the merchandise inside the dressing room. Appellant then headed directly for the exit, where he immediately turned around upon seeing Officer Smith pulling up to the store. After Appellant turned around, Singletary-Siso observed him removing items from inside his shirt. Once he was detained, pliers and a magnet were found on his person. Singletary-Siso described the holes in some of the shirts from where the EAS alarms had been removed. Appellant also made the statement, "Could have would have thought about it is not the same as shoplifting," which seems to indicate his belief that his acts of taking the shirts did not constitute shoplifting since he did not successfully get away from the store. All of this leads to the obvious conclusion that Appellant shoplifted from the Belk in North Augusta. The jury, thus, was presented with overwhelming evidence of Appellant's guilt. Appellant's conviction and sentence should be affirmed.

CONCLUSION

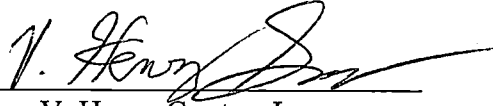
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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V. HENRY GUNTER, JR.
Assistant Attorney General

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Solicitor, Second Judicial Circuit

BY: 
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ATTORNEYS FOR RESPONDENT

April 29, 2016

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Aiken County
R. Lawton McIntosh, Circuit Court Judge

STATE OF SOUTH CAROLINA,

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EDWARD RODRIGUEZ ANTHONY,

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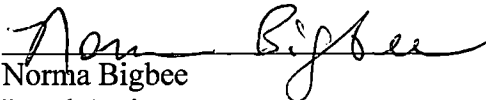
Appellant.

PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the within **Initial Brief of Respondent and Designation of Matter** on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to: Tiffany Butler, Esquire, Appellate Defender, SC Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.

This 29th day of April, 2016.


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ALAN WILSON
ATTORNEY GENERAL

April 29, 2016

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SC Court of Appeals

VIA HAND DELIVERY

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
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Columbia, SC 29211

Re: **State v. Edward Rodriguez Anthony**
Appellate Case No: 2015-001072

Dear Ms. Kitchings:

Enclosed please find the original of the **Initial Brief of Respondent and Designation of Matter** in the above matter for filing in your office. By copy of this letter we are serving opposing counsel with this brief today.

Sincerely,

V. Henry Gunter, Jr.
Assistant Attorney General
Bar No: 102259

VHG/nb
Enclosures

cc: Tiffany Butler, Esquire (2 copies enclosed)
Trisha Allen, Victim Services (1 copy enclosed)