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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County

R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

EDWARD RODRIQUEZ ANTHONY

APPELLANT

APPELLATE CASE NO. 2015-001072

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err by refusing to exclude evidence that Appellant allegedly shoplifted from the Belk Department Store on three separate occasions prior to the March 16, 2014 incident date, where 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 it had was substantially outweighed by its prejudicial effect against Appellant?

STATEMENT OF THE CASE

On July 14, 2014, the Aiken County Grand Jury indicted Appellant for shoplifting, third or subsequent offense. R. 268 Appellant's case proceeded to a jury trial before the Honorable R. Lawton McIntosh. R. 1. M. Bradley McMillian and Barry L. Thompson represented the State. R. 1. Jeffrey Alan Slocum, Cassie W. Hall, and Ashley Hammack represented the State. R. 1.

Appellant was found guilty as charged. R. 257. Judge McIntosh sentenced Appellant to six years' imprisonment suspended to forty-five months of active prison time and five years of probation. R. 265. This appeal follows.

STATEMENT OF FACTS

Introduction

This case involved an alleged shoplifting at the Belk Department Store in Aiken County, South Carolina. Appellant was seen on the surveillance cameras carrying various items of clothing around the men's department and into a fitting room. The police were called, responded to the scene, and arrested Appellant. He was charged with shoplifting as a third or subsequent offense.

Motion to Exclude Appellant's Alleged Prior Bad Acts

Prior to Appellant's trial, defense counsel moved to exclude alleged prior bad acts of Appellant pursuant to Rule 404(b) and State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). R. 52 Patsy Singletary, the lost prevention specialist of the Belk store, testified during the pre-trial hearing. R.53 Singletary stated that she observed Appellant walk into the store after 6:00 p.m. on March 16, 2014. R. 55 – 56. She claimed that she recognized Appellant because "there had been about three other incidents where Mr. Anthony entered the store where [she] witnessed him shoplifting." R. 54, ll. 16 – 19.

Singletary explained that she witnessed Appellant shoplifting through video surveillance cameras and while working on the sales floor. R. 56 Appellant usually wore an "oversize sweatshirt, baggy jeans, Polo-style collared (sic) shirt." R. 56 Appellant would enter the store, immediately walk to the men's Polo department, and leave the store within five minutes or less. R. 54, ll. 19 – 23.

Singletary asserted that Appellant would maintain the same pattern of activity whenever he entered the store. R. 56, ll. 9 – 11. Appellant would come into the store during the evening hours, quickly select clothing items in the men's department, and walk into the

fitting room. R. 56 – 57. However, Singletary could not recall the specific dates of the alleged shoplifting offenses. She asserted that they occurred "within the month or half of each other." R. 55, ll. 3 – 6. Appellant was not arrested nor charged for any of the alleged shopliftings. R. 71 – 72. Singletary made no reports about the alleged prior shopliftings to police or to any of the other sales associates in the store. R. 71 – 72.

According to Singletary, on March 16, 2014, she witnessed Appellant enter the store through the home department on one of the surveillance cameras. Singletary claimed to have recognized Appellant immediately and "zoomed in on him." R. 57, ll. 19 – 22. Singletary stated that she witnessed Appellant pick up various Polo shirts and walk into the dressing room. R. 106, ll. 9 – 16.

When Appellant walked out of the dressing room, he did not have any clothes in his hands. R. 107, ll. 1 – 3. Singletary then called the police. R. 106, l. 22 – R. 107, l. 3. Singletary claimed that she "witnessed Mr. Anthony in the corner removing items from under his shirt" near the back door just as the police arrived. R. 70 Appellant was arrested inside the store. R. 158 – 159.

The solicitor argued that the three prior shopliftings were relevant. The solicitor explained:

> "And we would take the position that the same, same time of day, same witness, Ms. Patsy being the one that views all three prior incidents, she obtained this information herself not only through surveillance but also on the floor in live action, same store, same area of the store, same department. We have the same type of clothes being selected. Same MO all the times prior."

R. 59, ll. 13 – 19.

The solicitor further contended:

> "And the fact that she was able to identify him immediately when he came in the door just not only goes to the common plan or scheme but also the identity of the Defendant himself on March 16th . . . in the evening."

R. 59, l. 20 – R. 60, l. 1.

Finally, the solicitor argued:

> "We feel like those factors in totality it's very relevant, and the probative value of those would outweigh any prejudicial effect the Defendant might allege."

R. 60, ll. 2 – 5.

Defense counsel responded:

> "[T]he three prior shopliftings are far more prejudicial than probative. To allow this in essentially gives him three additional charges that we have to combat with the jury. . ."

R. 61, ll. 11 – 14.

Counsel continued:

> "I do not believe they would constitute a common plan or scheme, Judge, because it's not unique. Guilt in one is not necessarily dependent on the other. These are isolated incidents. They are not a common plan or scheme."

R. 61, l. 23 – R. 62, l. 2.

Counsel concluded:

> "[I]n reading 404(B) and the specific language of the rule . . . the common scheme or plan exception essentially requires a common scheme or plan embracing the

> commission of two or more crimes so related that proof of one tends to establish the other. Judge, I don't believe a prior shoplifting, whether or not he committed it, tends to prove this shoplifting."

R. 74, ll. 9 – 16.

> "[T]he prejudicial value of what the prejudice will be to my client is so much heavier than any probative value that the State can glean from this . . ."

R. 75, l. 25 – R. 76, l. 2.

Judge's Ruling

The trial judge agreed that the prior three shopliftings were prejudicial against Appellant. R. 76, ll. 16 – 17. However, the judge opined that the prejudicial effect of admitting the prior acts was "not so much that [they] should be excluded." R. 76, ll. 17 – 18. The trial judge ruled that the three prior shopliftings were admissible under Rule 404(b), SCRE. R. 76, ll. 19 – 20. Counsel renewed his objections at the time the testimony of Appellant's alleged prior shopliftings was presented. R. 99; Tr. 154.

ARGUMENT

The trial judge erred by refusing to exclude evidence that Appellant allegedly shoplifted from the Belk Department Store on three separate occasions prior to the March 16, 2014 incident date, where 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 it had was substantially outweighed by its prejudicial effect against Appellant.

The trial judge should have excluded evidence of three prior shopliftings that Appellant allegedly committed at the Belk Department Store. Identity was not an issue at trial and the evidence was not necessary to show a common scheme or plan. The evidence had no probative value. Even if the evidence was relevant, its probative value was substantially outweighed by unfair prejudice against Appellant.

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, Patsy Singletary's testimony that she witnessed Appellant shoplifting at the Belk on three prior occasions was explosively and unfairly prejudicial. The prior bad act evidence was not necessary to prove Appellant's identity in this case as he was arrested inside the store minutes after the alleged shoplifting. See R. 158- 159. The perpetrator's identity was never an issue in this case.

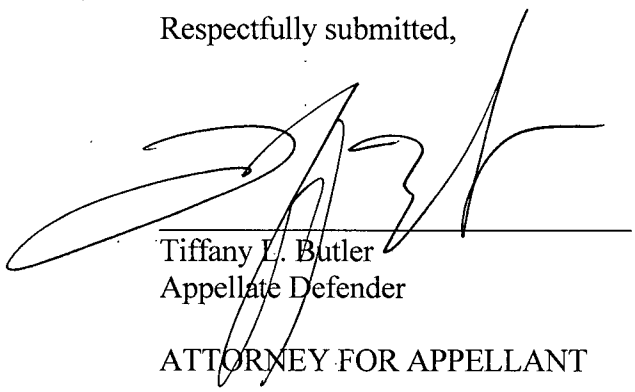
Although Singletary asserted that Appellant entered the store at the same time of day, wore the same type of clothes, and picked up the same type of clothing items from the same area of the store, those facts were not necessary to prove that Appellant committed the shoplifting for which he was on trial. As defense counsel argued prior to trial, even if Appellant was guilty of the prior shopliftings, that evidence was not necessary to show Appellant committed the March 16th shoplifting. Further, Appellant was never apprehended, arrested, or charged for the alleged prior shopliftings.

This evidence was explosively and unfairly prejudicial. Allowing the jury to hear testimony of three prior shopliftings made it impossible for Appellant to get a fair trial. Appellant could not get a fair trial if the jury knew he had committed the same offense on three prior occasions. Instead, the jury found Appellant guilty on the improper basis that if he shoplifted three times in the past, he must be guilty of this shoplifting. Therefore, the improper, inadmissible, and unfairly prejudicial prior bad act evidence should have been excluded.

CONCLUSION

For the reasons argued above, Appellant Edward Rodriguez Anthony respectfully requests this Court to reverse his conviction and sentence and remand to the lower court for a new trial.

Respectfully submitted,



Tiffany L. Butler
Appellate Defender

ATTORNEY FOR APPELLANT

This 20th day of June, 2016.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final 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."

June 20th, 2016.

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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 Henry Gunter, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Edward Rodriquez Anthony #363714 at the Trenton Correctional Institution, 84 Greenhouse Road, Trenton, SC 29847, this 20th day of June, 2016.

Tiffany L. Butler
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 20th day of June, 2016.

Christian Causey (L.S.)
Notary Public for South Carolina
My Commission Expires: March 1, 2026.