STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions
Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2015-001628

THE STATE, ...RESPONDENT,

v.

JUDSON STANLEY, ...APPELLANT.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial judge did not err in allowing the State to introduce Appellant's two prior convictions for insurance fraud, as they were admissible both as character evidence under Lyle and evidence of prior bad acts under Rule 404(b), SCRE.

STATEMENT OF THE CASE

Appellant was indicted at the November 2014 term of the Grand Jury for Horry County for presenting a false claim for insurance payment, valued in excess of $10,000. On July 13-16, 2015, Appellant proceeded to trial before the Honorable Benjamin H. Culbertson, and a jury. Thomas Floyd, Esquire, represented Appellant; and Assistant Attorneys General Melissa Manning, Esquire, and Deanene Thornwell, Esquire, represented the State. The jury found Appellant guilty, and the trial judge sentenced him to ten years' imprisonment and revoked his probation for two prior counts of presenting a false claim for insurance payment, with all sentences running concurrently. (R.p.270).

Appellant filed a timely Notice of Appeal and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

STATEMENT OF FACTS

The State alleged Appellant initiated contact with his codefendant, Tracy Holmes, after finding her profile on Match.com, and proposed a plan in which: (1) he would strip parts off of her vehicle; (2) Holmes would park her vehicle along the side of a road and call a tow truck because of purported "car problems"; (3) she would feign surprise when the tow truck driver notified her that her vehicle had been stripped; (4) she would have the car towed to City Collision, an automotive repair shop; (5) she would make an insurance claim for the missing parts; (6) Appellant would deliver the removed parts to the shop, where they would be reattached and treated as newly acquired parts; and (7) Holmes and Appellant would split the proceeds of the insurance check meant to pay for the missing parts on the vehicle. (R.p.1, line 20–R.p.2, line 10.)

Prior to swearing the jury, the State moved for the admission of Appellant's two prior convictions for presenting a false claim for insurance payment, arguing Rule 404(b), SCRE, allowed for their admission because they were evidence of motive, intent, and a common scheme or plan of the Appellant. (R.p.13, lines 1–16.) The State argued the prior convictions were more similar than dissimilar to Appellant's charge because both prior convictions involved: (1) Appellant removing parts from vehicles; (2) Appellant or a codefendant reporting the vehicles or parts therefrom as stolen; (3) the filing of insurance claims for the purported losses; (4) the discovery of the vehicles themselves or their missing parts in Appellant's possession; and (5) Appellant receiving thousands of dollars from each fraudulent claim. (R.p.2, line 11–R.p.4, line 21).

Appellant objected to the admission of the prior convictions, claiming: (1) they were unrelated to his current charge and thus were not "prior bad acts" admissible under

State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923); and (2) that the prejudice of admitting evidence of his convictions for similar crimes far outweighed any probative value. (R.p.5, lines 11–24).

The trial judge took the matter under advisement. (R.p.6, lines 12–20). After selecting the jury, the trial judge ruled the prior convictions were admissible, finding they showed motive, intent, lack of mistake, and a common scheme or plan. He then weighed the probative value of the convictions against their prejudicial effect. (R.p.8, lines 16–22). The State then explained to the trial judge that it had substantial evidence of Appellant's guilt, including recorded statements, the codefendant's testimony, and expert witness testimony identifying parts in Appellant's possession as those removed from the vehicle in question. (R.p.8, line 22–R.p.10, line 3). The trial judge found that, due to the substantial evidence against Appellant, the prejudicial effect of admitting the prior convictions did not outweigh their probative value. (R.p.10, line 19–R.p.11, line 6).

ARGUMENT

I.

The trial judge did not err in allowing the State to introduce Appellant's two prior convictions for insurance fraud, as they were admissible both as character evidence under Lyle and evidence of prior bad acts under Rule 404(b), SCRE.

Appellant argues the trial judge erred in allowing the State to introduce his prior convictions pursuant to Lyle because they, like his current charge, were for submitting false insurance claims. He contends the trial judge applied the wrong analysis when determining the prejudicial impact of prior convictions, because their striking similarity to Appellant's current charge enhanced their prejudicial effect. Appellant also contends that these prior convictions amounted to impeachment evidence, and the trial judge further erred in allowing the State to introduce evidence of the prior convictions before Appellant testified. See Mitchell v. State, 298 S.C. 186, 379 S.E.2d 123 (1989) (stating that in a criminal prosecution, the State cannot attack the character of a defendant until the defendant herself "first places her character in issue"). (Brief of Appellant, p.6). The State disagrees and submits Appellant's arguments are without merit. Appellant misconstrues South Carolina law, which permits the State to introduce evidence of a defendant's prior bad acts, even if they are similar to the crime with which a defendant is charged. Moreover, the State notes Appellant's prior convictions were admitted pursuant to Rule 404(b), SCRE, which allowed the State to provide evidence of those convictions prior to and independent of Appellant's trial testimony because they were not used for the purpose of impeaching Appellant. Finally, even if the trial judge erred in admitting the

prior convictions, such error is harmless based upon the overwhelming evidence against Appellant.

In criminal cases, the appellate court sits solely to review errors of law. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "The trial judge has considerable latitude in ruling on the admissibility of evidence and his decision should not be disturbed absent prejudicial abuse of discretion." State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). An abuse of discretion occurs when the trial court's ruling is based on an error of law. State v. Washington, 379 S.C. 120, 124, 665 S.E.2d 602, 604 (2008).

Generally, evidence of prior bad acts is not admissible to prove the crime for which the defendant is charged. State v. Henry, 313 S.C. 106, 432 S.E.2d 489 (Ct. App. 1993). However, prior bad acts may be admissible when they establish (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme or plan; or (5) identity of the person charged. Rule 404(b), SCRE; State v. Lyle, 125 S.C. 406, 118 S.E. 809 (1923). Evidence of prior bad acts is admissible if it tends to show a common scheme or plan and is sufficiently similar to the charged offense and its probative value clearly outweighs its prejudicial effect. State v. Blanton, 316 S.C. 31, 446 S.E.2d 438 (Ct. App. 1994).

To be admissible, the bad act must logically relate to the crime with which the defendant has been charged. State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009). "Further, even though the evidence . . . falls within a Lyle exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant." State v. Braxton, 343 S.C. 629, 634, 541 S.E.2d 833, 836 (2001) (citing Rule 403, SCRE; State v. King, 334 S.C. 504, 514 S.E.2d 578 (1999)).

Analysis of a prior bad act begins under Rule 401, SCRE. The court must first determine if the prior bad act is relevant under this rule. State v. Wallace, 384 S.C. 428, 433, 683 S.E.2d 275, 277 (2009). To be relevant, the prior bad act evidence must logically relate back to the crime with which the defendant has been charged. State v. Wiles, 383 S.C. 151, 679 S.E.2d 172 (2009).

Accordingly, South Carolina courts have allowed prior bad acts similar to the one for which the defendant is on trial to be used as evidence of motive and intent under Rule 404(b). See State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001) (finding defendant's prior conviction for the murder of a cab driver was properly admitted as evidence of motive and identity in murder trial, as both crimes involved robbery and the same murder weapon, and the Court found the probative value of the evidence outweighed its danger of unfair prejudice and proved the likelihood that defendant was guilty of the specific crime for which he was on trial); State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001) (finding evidence of a prior drug transaction was relevant to the use of intent when the defendant was charged with possession of a controlled substance with intent to distribute); State v. Smith, 337 S.C. 27, 522 S.E.2d 598 (1999) (stating a trial judge properly allowed evidence of defendant's domestic violence conviction three months prior to fatal shooting of infant daughter held by defendant's wife in prosecution for murder and assault and battery with intent to kill); State v. Martucci, 380 S.C. 232, 669 S.E.2d 598 (Ct. App. 2008) (finding evidence of prior incidents of defendant's alleged trial abuse of victim was admissible to prove intent and absence of accident in prosecution for homicide by child abuse); State v. Martin, 347 S.C. 522, 556 S.E.2d 706 (Ct. App. 2001) (finding evidence of defendant's marijuana use was admissible to

establish his motive and intent for his charge of possession of marijuana, given defendant's denial that the marijuana in his residence belonged to him).

Moreover, the similarity between prior bad acts and the crime charged is particularly important when determining whether the prior bad act is admissible as evidence of a common scheme or plan. Specifically, the Supreme Court of South Carolina has held that 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 if there is a close degree of similarity. "Such evidence is relevant because proof of one is strong proof of the other." Wallace, 384 S.C. at 433, 683 S.E.2d at 277-78. "When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b)." Id., 384 S.C. at 433, 683 S.E.2d at 278.

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." Rule 403, SCRE. "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (quoting United States v. Bonds, 12 F.3d 540, 567 (6th Cir. 1993)); see also State v. Dickerson, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000); United States v. Rodriguez–Estrada, 877 F.2d 153, 156 (1st Cir. 1989) ("[A]ll evidence is meant to be prejudicial; it is only unfair prejudice which must be avoided."). "A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." "We review a trial

court's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment." State v. Collins, 409 S.C. 524, 534, 763 S.E.2d 22, 28 (2014) (quoting State v. Adams, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003)).

The trial judge did not abuse his discretion in admitting Appellant's prior convictions into evidence. The Supreme Court of South Carolina specifically requires a "close degree of similarity" between the prior bad acts and a defendant's charged crime before evidence of the former can be admissible at trial: to be admissible under Rule 404(b), SCRE, a defendant's prior bad acts must be similar to the crime with which he is charged, or else they would be irrelevant under Rule 401, SCRE. See, e.g., Wallace, supra; Cheeseboro, supra; Wilson, supra. The Court has often found that the probative value of evidence of similar prior bad acts outweighs the danger of unfair prejudice to a criminal defendant, even in situations in which the prior bad acts were convictions similar to one for which the defendant was on trial. See, e.g., Cheeseboro, supra; State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000) (finding the trial judge did not err in allowing evidence of defendant's two prior burglary convictions during his trial for first-degree burglary because they were offered to prove a statutory element of the charge).

Here, Appellant's prior convictions shared numerous similarities with his current charges, including: (1) Appellant removing parts from the vehicles; (2) the reporting of the vehicles or the removed parts as stolen; (3) the filing of insurance claims for the purported losses; (4) the discovery of the vehicles themselves or their missing parts in Appellant's possession; and (5) Appellant receiving thousands of dollars from each fraudulent claim. (R.p.2, line 11–R.p.4, line 21). After determining Appellant's

convictions were admissible under Rule 404(b), SCRE, the trial judge weighed the probative value against the danger of unfair prejudice. He found, based on the significant evidence of Appellant's guilt including his own recorded, incriminating statements, that admission of the prior convictions was not unfairly prejudicial to Appellant. See Rule 403, SCRE; Gilchrist, supra at 427, 627 ("Unfair prejudice means an undue tendency to suggest decision on an improper basis."). Given the great deference afforded the trial court's balancing of the probative value and potential for undue prejudice in admitting evidence of the prior convictions, this Court should not reverse the trial judge's ruling. See Collins, supra.

Additionally, the trial judge did not err in allowing the State to introduce the convictions prior to Appellant testifying. Appellant's broad assertion that his prior convictions were not admissible because they "amounted to" impeachment evidence and thus should not have been introduced prior to his testimony is completely without merit. In Mitchell, supra, the South Carolina Supreme Court found the State had improperly attacked the defendant's character with evidence of "devil worship" and mafia membership for the sole purpose of proving she "was a bad person with a propensity to commit [murder]." Here, unlike in Mitchell, the prior bad act evidence was admitted pursuant to a rule of evidence, Rule 404(b), and for the purpose of proving motive, intent, and a common scheme or plan. South Carolina appellate courts have consistently allowed for the admission of prior bad act evidence prior to a defendant's testimony, provided such evidence is properly admitted pursuant to the South Carolina Rules of Evidence. See, e.g., Wallace, supra (allowing the sister of a victim of sexual abuse to testify about her own sexual abuse by defendant).

Moreover, Appellant's reliance on Rule 609(a)(1), SCRE, is misplaced. Rule 609(a)(1), which allows parties to impeach witnesses using evidence of criminal convictions, applies only to the impeachment of witnesses who are not defendants.[1]

Harmless Error

Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). An error is harmless beyond a reasonable doubt if it does not contribute to the verdict. State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008); see also State v. Tapp, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012) ("Engaging in this harmless error analysis, we note that our jurisprudence requires us not to question whether the State proved its case beyond a reasonable doubt, but whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict."). Admission of improper evidence is harmless where it is merely cumulative to other evidence. State v. Haselden, 353 S.C. 190, 197, 577 S.E.2d 445, 448-49 (2003); State v. Johnson, 298 S.C. 496, 499, 381 S.E.2d 732, 733 (1989).

In the instant case, the State provided overwhelming evidence of Appellant's guilt, including his recorded incriminating statements, the codefendant's testimony against Appellant, and an expert witness who testified that the parts found in Appellant's possession were the ones that were removed from the codefendant's vehicle. Thus, even

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[1] Specifically, Rule 609(a)(1), SCRE states:

> [E]vidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, [SCRE,] if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused . . . .

(emphasis added).

if the trial judge erred in admitting the prior convictions under Rule 404(b) and Lyle, any error is harmless in light of the above evidence.

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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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent 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."

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PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.
This 18th day of February, 2016.

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