ORIGINAL

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions
D. Garrison Hill, Circuit Court Judge

Appellate Case No. 2015-001994

THE STATE, ...RESPONDENT,

v.

PHILLIP JOSEPH STEGALL.....APPELLANT.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial court properly admitted evidence of a 2011 criminal domestic violence altercation in which Appellant threatened to kill his ex-wife under Rule 404(b), SCRE, res gestae theory, and as an admission by a party opponent to prove Appellant's intent to hire a hitman to murder his ex-wife.

STATEMENT OF THE CASE

On November 25, 2014, the Greenville County Grand Jury indicted Appellant for solicitation of a felony (2014-GS-23-02698). On September 8, 10, and 11, 2015, Appellant proceeded to a jury trial before the Honorable D. Garrison Hill. John V. Crangle represented Appellant, and Assistant Solicitor Stan L. Overby represented the State. The jury found Appellant guilty of the charged offense. The trial judge sentenced Appellant to ten years' incarceration.[1]

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

[1] The trial judge also ordered Appellant to obtain treatment for his anger and substance abuse issues during service of his sentence. (R.p.394, lines 13–22).

STATEMENT OF FACTS

In June 2011, Appellant and his ex-wife, Jessica Stegall (Ex-wife), began arguing over whether Appellant should take their four-month-old son (Son) on some of his landscaping assignments. Ex-wife argued against Appellant taking Son, believing that Son could be harmed by spending significant time in the hot weather. The argument escalated, and Appellant became physically aggressive with Ex-wife. Scared, Ex-wife began recording the fight on her cell phone (Recording) as evidence of Appellant's behavior. After she began recording, Appellant threatened to kill Ex-wife. Ex-wife claimed Appellant would go to jail if he committed such a crime, but he responded that he would "bury [her]" and that "[he] [wouldn't] get caught." Concerned, Ex-wife ran down her street to a police officer's house, who in turn called 911. Appellant was arrested, and Ex-wife was taken to Appellant's mother's home. Approximately two weeks later, Ex-wife moved back in with Appellant. Approximately a month later, the two separated and subsequently divorced. (R.p.211, line–R.p.214, line 22; R.p.240, line 6–R.p.242, line 11; R.p.246, line 4–R.p.250, line 2; State's Exhibit 37).

As a result of his actions and statements, Appellant was charged with criminal domestic violence, first offense. Ultimately, Appellant pled guilty to public disorderly conduct. (R.p.248, lines 3–5; R.p.250, lines 8–10).

Around that same time, Henry Manson began working for Appellant at his landscaping company. Manson and Appellant became friends, and at one point the two lived together for several months. (R.p.51, line 16–R.p.54, line 7).

In January 2014, Manson was living in a Motel 6 in Simpsonville, South Carolina. On January 25, Manson called Appellant. Later, Appellant brought Son and visited Manson in his room. While the two men chatted, Appellant expressed frustration with the custody battle over

Son, noting that if his wife was out of the picture, he would have sole custody of his son. Appellant offered Manson $5,000 to murder Ex-wife, proposing he wait at her workplace, a local Buffalo Wild Wings, and ambush her by jumping over the fence. Appellant showed Manson the gun he would use for the crime, and stated both men would check out the area surrounding Ex-wife's workplace the following morning. (R.p.54, line 19–R.p.60, line 15).

Manson determined Appellant was serious about the murder, and called his stepbrother, Joseph Ashworth, to discuss the night's events. After speaking with Ashworth, Manson decided to call the Simpsonville Police Department and report the crime. Manson met with officers, provided a videotaped statement about his conversation with Appellant, and agreed to wear a wire when he met with him the next morning. (R.p.62, line 14–R.p.64, line 5; R.p.64, line 19–R.p.65, line 24).

The following morning, the officers placed a wire on Manson, returned him to his room, and waited nearby. Appellant arrived around 10:00 a.m., at which point Manson attempted to elicit incriminating statements from him. Appellant made a few recorded comments, including a statement about paying Manson $5,000, with the first payment of $750 the following week, but stopped talking after he spotted a police vehicle pull-up outside the window. After spotting the car, Appellant stated "we're not doing nothing." At this point, officers arrested Appellant. (R.p.66, line 1–R.p.70, line 12; State's Exhibit 13).

During the summer of 2014, Appellant approached Manson at his work and home about this case, insisting that he had offered Appellant a "drainage job," not an offer to kill Ex-wife. Manson would go on to work for Appellant again in various capacities, but was never paid. Appellant also persuaded Manson to sign an affidavit claiming Manson was "confused and inebriated" on the night of January 24, which led him to misconstrue Appellant's comments as a

legitimate desire to have Ex-wife murdered. Manson also claimed Appellant was a good father. On August 29, 2014, the affidavit was signed and submitted to the family court as part of Appellant's efforts to obtain custody of Son. After Investigator James Donnelly found out about the affidavit, he met with Manson and explained to him that he needed to be honest and not lie about any part of the crime and its investigation. (R.p.70, line 13–R.p.75, line 9; R.p.127, lines 4–14; R.p.286)

At the pretrial hearing, Counsel objected to the use of the Recording, arguing:

> It's the [d]efense's position, one, that this evidence is two and a half years – it's almost 900 days old – or separated from the two events. They're pretty distinct events, Judge.
>
> The second thing is, I think it's extremely prejudicial to [Appellant], basically, bringing up prior criminal domestic violence altercations and a public disorderly conduct conviction without [him] the stand and putting his character at issue, Judge.
>
> And, therefore, I think, one, it's too remote. And I don't' think it really is relevant to the case at bar. The question for this case is, did [Appellant] hire someone to kill [Ex-wife], not was [Appellant] and [Ex-wife] arguing in 2011?
>
> Now, if we open the door through our [d]efense to mistake, lack of intent, things like that, I think maybe we could revisit the issue, Judge. . . .
>
> I mean, you're talking about a 900-day difference. And that's why I think it's, one, not relevant. And if you do find it relevant under 404(b), I would still move to exclude it under 403 as extremely prejudicial. . . .

(R.p.10, lines 6–R.p.11, line 4)(emphasis added).

The State argued the Recording was critical evidence of Appellant's intent, in light of Manson's affidavit in which he recanted his claim that Appellant hired him to murder Ex-wife. The trial judge determined he needed more information before excluding the Recording, and

would decide admissibility under Rules 404(b) and 403 during the trial. (R.p.11, line 8–R.p.13, line 2).

During the trial, Manson testified that on the night of January 25, 2014, he believed that Appellant was trying to hire him to murder Ex-wife. Additionally, both Manson and Ashworth claimed they spoke with one another that night and that Manson was seriously disturbed by his conversation with Appellant. Counsel challenged Appellant's testimony on cross-examination, focusing primarily on his affidavit and his criminal history[2] and claiming Manson contacted police in an effort to reduce his own charges. (R.p.63, line 4–R.p.64, line 1; R.p.76, line21–R.p.77, line 24; R.p.92, line 11–R.p.96, line 3; R.p.105, line 7–R.p.106, line 15).

Ex-wife also testified at trial. When Ex-wife began to testify about her relationship with Appellant, Counsel renewed his objection to the admission the Recording and Ex-wife's testimony regarding the 2011 incident, claiming both were; (1) "impermissible character evidence under 404(b)" because it did not show motive or intent; and (2) irrelevant under 403 due to the elapsed period between that incident and the January 25, 2014 conversation. Counsel argued in the alternative that should the trial judge determine that evidence of the 2011 incident was relevant, that he at least limit such evidence to Ex-wife's testimony. (R.p.208, line 11–R.p.209, line 20; R.p.215, line 5–R.p.217, line 14).

The State countered by arguing intent was "the central issue in this case" and by pointing out that Counsel's theory of the case was that this incident was a joke which Manson misinterpreted. The State also noted the very reason the Recording existed was because Ex-wife was scared that Appellant would kill her, and Appellant's desire to actually harm was the critical question in the case. (R.p.209, line 23–R.p.211, line 1).

[2] At the time of the incident, Manson had 11 charges pending in the circuit court arising from him stealing money from his father; nine counts of forgery, and two count of abusing a vulnerable adult. (R.p.16, lines 21–25).

After listening to the proffered testimony and the Recording, the trial judge determined the Recording was admissible under 404(b) and the res gestae theory. He found "the tenor of the conversation, and the tone, and other circumstances that are captured on the recording are the best evidence of it" and that the State would abstain from referencing the arrest or conviction resulting from the 2011 incident. The trial judge did note that the temporal proximity between the 2011 incident and the instant crime was somewhat troubling. However, because the issue of intent was "front and center" in the trial, he found the Recording still had "high probative value." He further found the Recording, when considered with the other evidence[3] presented, showed Appellant maintained a high level of continuous anger and hatred for his wife which existed at least as early as the 2011 incident. He also found the evidence was admissible under Rule 403, as its probative value was not substantially outweighed by unfair prejudice or the other dangers set forth under the rule. (R.p.217, line 17–R.p.222, line 9).

When the jury returned to the Courtroom, the State's direct examination of Ex-wife resumed. The State asked Ex-wife about the 2011 incident, and she testified about Appellant's statements regarding her "going to the morgue," him "burying" her, and that he would "get away with it" if she reported his threats to the cops. She also testified to the events surrounding that incident. Counsel did not object to any of this testimony. It was only when the State sought to introduce the Recording that Counsel renewed his objections. (R.p.240, line 6–R.p.241, line 25).

[3] The State submitted a notebook and other documents recovered from Appellant's vehicle which contained writings in which Appellant: (1) spoke of his continued anger towards Ex-wife; (2) wrote out plans how to win the custody battle; and (3) his reflections on what he believed were lying and manipulation which occurred during and after their marriage. (R.p.228, line 24–R.p.231, line 3; R.p.287–R.p.288; State's Exhibit 39).

ARGUMENT

The trial court properly admitted evidence of a 2011 criminal domestic violence altercation in which Appellant threatened to kill his ex-wife under Rule 404(b), SCRE, res gestae theory, and as an admission by a party opponent to prove Appellant's intent to hire a hitman to murder his ex-wife.

Appellant argues the trial judge erred in admitting evidence of the 2011 crime because it occurred approximately 969 days prior to the instant crime, Appellant and Ex-wife reconciled after the argument, the probative value of the evidence was substantially outweighed by unfair prejudice, and it was not part of Appellant's res gestae.

The State disagrees with Appellant's allegations of error. Initially, the State notes Appellant failed to timely object to Ex-wife's testimony regarding the 2011 crime and only objected to the introduction of the Recording. Accordingly, any issues regarding the admission of Ex-wife's testimony are not preserved for review, and the admission of the Recording is harmless error because it is cumulative. Additionally, Appellant's issue is meritless for several reasons: the 969 day period is well within the range of time periods found acceptable by the South Carolina Supreme Court; Appellant and Ex-wife only briefly reconciled following the 2011 crime; the evidence was necessary evidence of Appellant's motive and intent; and the evidence was a part of Appellant's res gestae. Moreover, even if the evidence was not admissible under Rule 404(b), SCRE or res gestae theory, Appellant's statements were admissible as statements of a party opponent.

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)).

Evidence of prior bad acts is admissible when it furnishes part of the context of the crime or is necessary to a full presentation of the case. State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996); State v. Fletcher, 363 S.C. 221, 246, 609 S.E.2d 572, 585 (Ct. App. 2005). "The res gestae theory recognizes that evidence of other bad acts may be an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred." Fletcher, 363 S.C. at 246, 609 S.E.2d at 585 (citing State

v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001); State v. Wood, 362 S.C. 520, 608 S.E.2d 435 (Ct. App. 2004).

This evidence of other crimes is admissible:

> when such evidence "furnishes part of the context of the crime" or is necessary to a "full presentation" of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its "environment" that its proof is appropriate in order "to complete the story of the crime on trial by proving its immediate context or the 'res gestae' " or the "uncharged offense is 'so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other ... '[and is thus] part of the res gestae of the crime charged.' And where evidence is admissible to provide this 'full presentation' of the offense," [t]here is no reason to fragmentize the event under inquiry" by suppressing parts of the "res gestae."

State v. Adams, 322 S.C. at 122, 470 S.E.2d at 370-71 (quoting United States v. Masters, 622 F.2d 83, 86 (4th Cir.1980) (citations omitted)).

"As a general rule, statements or declaration made by one accused of a crime are admissible against him." State v. Plyler, 275 S.C. 291, 270 S.E.2d 126 (1980) (finding testimony concerning a verbal altercation between victim and defendant prior to the murder was admissible as evidence of accused's motive and related to defendant's identity as perpetrator); see also Rule 801(d)(2)(A), SCRE ("A statement is not hearsay if . . . [t]he statement is offered against a party and is (A) the party's own statement in either an individual or representative capacity . . . ."). An extended period between a defendant's statement and the commission of his crime does not automatically preclude the admission of a statement; rather, a significant lapse of time should, at most, bear on the weight of the evidence, which is a matter for the jury's determination. See State v. Beck, 342 S.C. 129, 536 S.E.2d 679 (2000) (finding a four month lapse between a defendant's statement about planning to rob escorts and his robbery and murder of an escort was admissible as a statement of a party opponent).

"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)).

Preservation and Cumulative Evidence

The State notes Appellant failed to timely object to Ex-wife's testimony about the 2011 crime. Accordingly, any issues regarding that testimony are not preserved for review. See State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013) (stating that making a motion in limine to exclude evidence at the beginning of trial does not preserve an issue for review because a motion in limine is not a final determination, and requiring a party to make a contemporaneous objection when the evidence is introduced). Moreover, because Ex-wife's testimony is admissible, any error in admitting the Recording is harmless as it was merely cumulative to her testimony. See

e.g., State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993) (any error in admission of evidence cumulative to other un-objected to evidence is harmless).

Rule 404(b), SCRE, Res Gestae Theory, and Relevance

The State notes Appellant is incorrect about the duration of Appellant and Ex-wife's "reconciliation." As noted in the Recording, Ex-wife felt she and Appellant should divorce. Two weeks after the incident, Ex-wife moved back into her house with Appellant, but such arrangement lasted approximately a month, at which point she and Appellant began a one-year separation to initiate divorce proceedings.

Here, evidence of the 2011 crime was admissible under 404(b) because it was necessary for establishing Appellant's motive and intent. Counsel, through cross-examination of the State's witnesses and direct examination of Appellant's witnesses, presented two main defenses: (1) Manson fabricated his story about Appellant requesting he murder Ex-wife in an effort to help police investigate the crime in the hope that said cooperation would result in the reduction or dismissal of his own pending criminal charges; and (2) Appellant sought to hire Manson for a "drainage job," and Manson was simply confused about the tenor of the January 25 conversation. Because Appellant was charged with solicitation of a felony, it was essential for the State to provide evidence illustrating the context of Appellant's statements to Manson. This was particularly important in the instant case because Appellant approached Manson several times after the crime and persuaded him to change his story to police. The evidence of the 2011 crime combined with Manson's testimony about the night of January 25 was concrete evidence that Appellant intended to hire Manson to kill Ex-wife so that Appellant would have unrestricted custody of son.

Additionally, the Recording is admissible under the res gestae theory because it provides valuable context about the dynamic of Appellant's relationship with Ex-wife. The 2011 crime was not just a simple argument between the two; rather it resulted in a criminal domestic violence charge and ultimately a plea to public disorderly conduct. This event was the culmination of Appellant's abusive treatment towards Ex-wife, and led to their separation and eventual divorce. It also demonstrates that the two had a particularly contentious relationship when it came to the control of their son. As evidenced by the Recording, the motivation for the 2011 crime was the issue of control over Son. Appellant became irate when Ex-wife informed Appellant that he should not take Son around on his workday, as Son was only four months old and the intense summer heat could be harmful to him. Appellant became irate after this statement, and only became more infuriated when Ex-wife stated she wanted to speak with a divorce attorney, threatening to kill her. These two issues, control of Son and the divorce, were the very issues which Appellant cited to when he proposed Manson murder Ex-wife. Even though the 2011 crime occurred 969 days prior to the instant crime, it is a telling example of Appellant's unbounded rage for Ex-wife and her limitations on his control of Son.

Moreover, the 969-day-period between the 2011 crime does not affect the relevance of the 2011 crime to this case. Not only does Appellant fail to cite to any law placing specific restrictions on the time frame for admissible 404(b) evidence, but South Carolina courts have repeatedly upheld convictions involving 404(b) evidence occurring years before the charged crime. See, e.g., State v. Hubner, 384 S.C. 436, 683 S.E.2d 279 (2009) (upholding conviction in which State used evidence a prior sexual assault which occurred against a different victim fourteen years prior to the first assault against victim); State v. Wallace, 384 S.C. 428, 683

S.E.2d 275 (2009) (upholding conviction in which State presented evidence prior sexual assaults which occurred against victim's older sister years before defendant's attacks on victim).

Admission as a Statement of a Party Opponent

The evidence of the 2011 crime was independently admissible as an admission by a party opponent. In Beck, the South Carolina Supreme Court found the trial court erred in admitting a defendant's statements of intent made four months prior to the crime as prior bad act evidence under Lyle, noting that the a mere statement of intent to commit a crime is not an actual "act." However, the court noted the defendant's statements were clear statements of defendant's "intent to perpetrate such crimes—albeit four months prior to the event—[and] highly probative as to the manifestation of that intent through the fatal attack upon [the] [v]ictim." The court also noted the "temporal attenuation" between the making of the statement and the crime was "at most a matter bearing on the weight of the evidence, which was for the jury to determine." Accordingly, the court found the defendant was not prejudiced by the admission of the evidence under the prior bad act standard.

In the instant case, Appellant's 2011 statements were not only the subject of a criminal conviction, but also statements of his intent to murder Ex-wife. Regardless of the Recording's admissibility under 404(b) or res gestae theory, it was admissible as a statement by a party opponent. See Beck. Moreover, as in Beck, the time lapse between the 2011 crime and the instant crime was a matter bearing only on the weight of the evidence, as Appellant's clear statement of intent to kill Ex-wife without being caught was highly probative of his manifestation of that intent through his attempt to hire Manson to commit the murder. Thus, the probative value of the evidence far outweighed any possibility of undue prejudicial effect. See Rule 403, SCRE; Beck, 342 S.C. at 134–35, 536 S.E.2d at 682.

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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