STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Alison Renee Lee, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JERRY L. GARDNER, JR.,

APPELLANT

APPELLATE CASE NO 2015-002604

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in admitting pursuant to Rule 404(b), SCRE, the redacted "sticky note" from Appellant's Probation Agent Grissett with his next appointment time that was found in the car Appellant was allegedly driving during the car chase on the basis that it related to identity which was the primary issue?

STATEMENT OF THE CASE

On July 6, 2015, the Charleston County Grand Jury indicted Jerry Lewis Gardner, Jr. on the charges of habitual traffic offender, receiving stolen goods, and failure to stop for a blue light (FTSBL). On August 3, 2015, Gardner proceeded to trial before the Honorable Alison Renee Lee and a jury. Gardner was represented by Chris Geel and Ted Smith, and the state was represented by Charles Condon and Scott Maynor. R. 1. The jury returned verdicts of guilty on the three charges as indicted. R. 231, ll 1 – 25. Judge Lee sentenced Gardner to five years on the habitual traffic offender charge; five years on the FTSBL; and seven years on the receiving stolen goods charge. All sentences were to run concurrent to each other. R. 239, ll. 4 – R. 240, ll. 22. Defense counsel filed a motion for a new trial which the judge denied on December 9, 2015. R. 249. Gardner filed a notice of appeal. This appeal follows.

STATEMENT OF FACTS

On December 17, 2014, Joshua Snyder, who was a college basketball coach in the Charleston area, had returned from an away game about 2:30 in the morning. He lived in an apartment complex but left some belongings in his car when he went inside. The next morning, he realized that the rear window of his vehicle was smashed and his car had been broken into. R. 17, ll. 1 –R. 19, ll. 1. Stolen from his vehicle were $208 from the center console, an iPad, a blue Samsonite bag with various items of clothing including gym shorts. R. 19, ll. 2 – 25.

Snyder explained that the iPad had a tracker when it was turned on so he monitored it during the day. Around 3:40 that afternoon, he received a ping on the iPad meaning it was turned on. Whoever had it had no access because Snyder had a security code. He called the police but the iPad cut off. It came back on about 7:00 pm so the police started following it because it was moving as in a car. R. 20, ll. 18 – R. 22, ll. 17.

Officer Jerrid Riley received a call from another officer to track the iPad to an address on West Montague Boulevard where it was pinging. Officer Riley located the intersection where the iPad was pinging and saw the vehicle where the pings were occurring. He initiated a traffic stop on the gold Ford Explorer with his siren and lights on. The car did not stop. Officer Riley had an in car video. Then due to the location, the Charleston County Sheriff's deputies took over the pursuit. R. 27, ll. 1 – R. 29, ll. 24. Officer Riley was not able to identify the driver. R. 51, ll. 1 – 13.

Deputy Donald Stanley took over the pursuit of the vehicle after hearing it on the radio. He chased the car about sixteen minutes when the chase ended on Locksley Drive where the street came to a dead end. The driver ran from the car and ran towards Saint Andrews Garden Apartment. R. 33, ll. 1 – R. 36, ll. 25.

Deputy Stanley lost sight of the passenger but he saw the driver. He did not get a look at the driver's face but said he was dressed in black clothing and black hoodie. He was about six feet tall and skinny. He only saw the driver from behind as he was fleeing. R. 37, ll. 1 – 25. At trial the officer said that Gardner's clothing was consistent with what he saw the driver wearing. R. 45, ll. 1 – 19.

Sergeant Jason Cain with the Charleston County Sheriff's Office was involved in the car chase but entered a few minutes later. He started as a secondary vehicle. He had an in car video as his blue lights were activated. When the car stopped, the driver and passenger ran. Officer Cain got a "really good look" at the passenger. He did not "observe" the driver because the officer was "concentrating "on trying not to hit the car in front of him. He did describe the passenger as a "fairly tall black male" wearing dark clothing with four to six inch long "kind of twists or braids in his hair." Officer Cain said that Gardner when he was detained as a suspect was "inconsistent" with the passenger. On the car video, the driver and passenger were seen jumping from the car but Officer Cain said that the passenger could definitely be seen. R. 52, ll. 1 - R. 56, ll. 22. There was just a "glimpse" of the driver. R. 58, ll. 1 – 15.

Officer Michael Baker with the City of Charleston police, received a call on the night of December 18, 2014, of the high speed car chase. He was informed that the driver was in the vicinity of the Saint Andrews Garden apartments. Officer Baker "positioned" himself at the entrance of Saint Andrews Garden apartments since there was only one way in or out. He was checking cars as they left looking for the suspect. R. 69, ll. 1 – R. 70, ll. 24. The description of the suspect that he had was a black male wearing black pants and black hoodie. R. 72, ll. 1 – 20.

Officer Baker looked into five or six cars as they were leaving. The last car he stopped was a "little red pickup truck" with two black males. The passenger matched the description of

the suspect so the officer stopped the truck. The passenger told the driver to go. The driver went about ten feet and stopped since the police were yelling for him to stop. Backup had arrived so they removed the two men from the truck, R. 72, ll. 21 – R. 73, ll. 25.

At first the driver said he did not know the passenger and had just picked him up. Then the officer learned that the driver was Jerry Gardner, and the passenger was Jerry Gardner, Jr. R. 74, ll. 1 – R. 75, ll. 25.

Deputy Austin Rissanen was involved with looking for the suspect. When the red truck was stopped, he was called because they had a person who matched the description. He interviewed the father who told him finally he was Gardner's father. According to Deputy Rissanen, the father told him that his son Gardner had called him very upset and said that he was "running from law enforcement" and needed for his father to come get him. Deputy Rissanen then took Appellant Gardner into custody. R. 87, l. 1 – R. 91, ll. 21. At trial, the father denied telling the deputy about his son telling him that he was running from the law. R. 83, ll. 24 – R. 84, ll. 5.

At the detention center, Gardner told the deputy that his fingerprints would be in the car as the car belonged to his girlfriend. Gardner also admitted that his fingerprints would be on the iPad. Gardner explained that he bought the iPad from an unknown subject so the police could not charge him with burglary. Gardner said he could only be charged with receiving stolen goods. R. 93, ll. 1 – R. 95, ll. 2.

In a pretrial motion, defense counsel objected to the state calling as a witness Agent Grissett from the Department of Probation, Pardon and Parole who would testify that she gave a note found in the car to Jerry Gardner. The state explained that this was a sticky note found on the center console of the car involved in the chase. The note had written on it: Agent Grissett

return January 13. The state wanted Agent Grissett to testify that she gave this note to Gardner on December 9 which was the day he kept his appointment with probation. The state explained that the sticky note was necessary to put Gardner in the car because part of the defense was that Gardner was not in the car. This sticky note, the state argued, was relevant because it put Gardner in the car on December 9 which was close to the incident date of December 18. The state would not mention probation and would redact the heading that included the words Department of Probation, Pardon and Parole. R. 8, ll. 1 – R. 12, ll. 3.

The judge ruled that the sticky note was relevant in "light of the potential defenses." She understood the concern about the prejudice. The judge ruled to redact the agent part and the heading and not to mention where the witness worked. R. 12, ll. 4 – 19.

Defense counsel told the court that the biggest issue was identity and whether the state could prove that Gardner was driving the car. R. 104, ll. 3-8.

During the trial and before Agent Grissett testified, the state asked the court to address how to admit the sticky note. Defense counsel said that he "maintained his prior objection to this." Counsel argued that he did not see how the note could be redacted in a way that would make any sense to the jury. The state argued that the sticky note was the only piece of evidence that has a time date on it close to the event that was probative of Gardner being in the car, and the defense's argument was that he was not in the car. R. 105, ll. 23 – R. 108, ll. 24.

The judge said there were other evidentiary provisions such as bad acts that could be admissible to prove identity or motive. However, no one had discussed those. Defense counsel argued that the note had no relevance without knowing who it was from, and it was too prejudicial for Agent Grissett to testify as the jury would "surmise" how Gardner had contact with her. Counsel argued that the note did not have Gardner's name on it and without Grissett's

testimony it was not relevant. And it was too prejudicial for Grissett to testify. R. 109, ll. 1 – R. 110, ll. 25.

The state then argued that the note was admissible under Rule 404(b), SCRE, to prove identity. Identity was the 'heart of the matter in this case." The judge said there has to be some "logical connection between the prior bad act itself and the crime with which the person is charged." R. 110, ll. 9 – R. 111, ll. 25.

Agent Grissett then testified *in camera* that she saw Gardner on December 9, 2014 for his follow up appointment with probation. R. 113, ll. 13 – R. 114, ll. 24. On cross-examination, Agent Grissett admitted that it was possible she gave that sticky note to someone else. Defense counsel then argued that was an authentication problem without Gardner's name on it. R. 113, ll. 13 – R. 117, ll. 25.

The state argued that they just wanted to establish a timeline as to when Gardner got the note. Defense counsel argued that none of this had any relevance without knowing who Agent Grissett was and why she had contact with Gardner. R. 118, ll. 17 – R. 300, ll. 12.

The judge ruled that the evidence was relevant and was admissible under Rule 404(b) as it related to the issue of identification. The judge said that Agent Grissett would not be in uniform and would not say where she worked. R. 122, ll. 1 – R. 136, ll. 17. Defense counsel asked to put his objection on the record as to the note being admitted under Rule 404(b). R. 124, ll. 1 – 24. The judge suggested that a copy be made of the note and that the top heading that says probation be redacted and that the word "agent" be redacted. She said that would "get us past any inference about prior bad acts." R. 128, ll. 1 – 25.

When the sticky note was admitted into evidence as State's Exhibit 49, defense counsel objected by saying "subject to our prior objection." R. 139, ll. 11 – R. 140, ll. 11.

The jury found Gardner of the three charges of habitual traffic offender, failure to stop for a blue light, and receiving stolen goods. R. 231, ll 1 – 25.

ARGUMENT

The trial court erred in admitting pursuant to Rule 404(b), SCRE, the redacted "sticky note" from Appellant's Probation Agent Grissett with his next appointment time that was found in the car Appellant was allegedly driving during the car chase because it related to identity which was the primary issue.

Rule 404 (b), SCRE, provides that Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.

Rule 403, SCRE, provides that although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.

In State v. Lyle, 125 S.C. 406,118 S.E. 803 (1923), the Supreme Court held that where there was serious doubt as to the admissibility of evidence, that doubt should always be resolved in the defendant's favor. The Court in Lyle also held that evidence of other crimes or acts was only admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or intent.

In State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006), the Supreme Court held that to be admissible under the other-crimes rule, a prior bad act must logically relate to the crime with which the defendant has been charged. Citing State v. Beck, 342 S.C. 129, 536 S.E.2d 679, 682-83 (2000). In Pagan, Pagan had made a statement to a girl named Lambert that he ran from the police because a woman named Monica had accused him of murdering someone and he was out

on bond for that murder. The trial court allowed Lambert's testimony pursuant to Rule 404(b), SCRE, as evidence of identity. The Supreme Court ruled that the admission was in error because the bad act did not logically relate to the murder of the victim, Gloria Cummings. It did not identify Pagan as the person who murdered this victim.

The Court in Pagan also held that even if the prior bad act evidence was clear and convincing and fell within an exception, it must be excluded if its probative value was substantially outweighed by the danger of unfair prejudice. Citing State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001).

The trial court erred in Gardner's case by allowing the redacted sticky note into evidence because it was more prejudicial then probative. It was confusing after redaction as it did not have person's name and was not relevant without Gardner's name. Even Agent Grissett admitted it was possible she had given this note to someone else. It could not be admitted without being redacted because it would have been more prejudicial than probative.

The sticky note was not properly admitted pursuant to Rule 404(b), SCRE, because it was not a bad act and did not meet an exception. It was only a note for a probation appointment. The prior bad act was the previous conviction for breaking and entering for which he was on probation. R. 120, ll. 1 – 19. There was no evidence presented of the conviction for breaking and entering. The sticky note was not logically related to the crime for which he was on trial as it did not identify Gardner as the person in the car during the chase. The note was written to Gardner on December 9 and the incident was December 18.

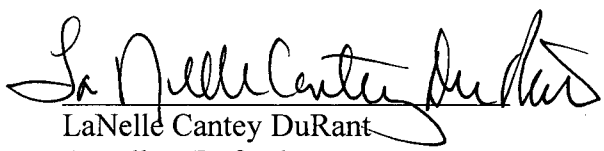
In State v. Braxton, id., testimony that the witness knew that the appellant possessed a nine millimeter pistol was relevant because it tended to identify the appellant as the possessor of the murder weapons which was a nine millimeter pistol.

In State v. Cheesboro, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001), the prior murder was admissible to establish the appellant's identity in the prosecution of the current murder where the same weapon was used in both murders.

Gardner's case is distinguished from these examples because the redacted sticky note did not identify Gardner and had no logical connection to the current crime. There was no evidence that Gardner placed that note in the car on the day of the incident or even two or three days before.

CONCLUSION

Based on the above, Appellants convictions and sentences should be reversed, and his case remanded for a new trial.



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This 28th day of October, 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, 20014, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

October 28, 2016

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