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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Hampton County

Honorable George C. James, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

EBONY EVELYN CASTRO,

APPELLANT

APPELLATE CASE NO 2016-001056

ANDERS BRIEF OF APPELLANT

ROBERT M. PACHAK
Appellate Defender

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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in allowing evidence of prior difficulties/prior bad acts between appellant and the alleged victim, Monique Singleton, when the evidence was unduly prejudicial as propensity evidence?

STATEMENT OF THE CASE

Appellant was convicted of assault and battery in the second degree after a jury trial held before the Honorable George C. James in Hampton County on Mya 9-11, 2016. Appellant was sentenced to two (2) years imprisonment. Defense counsel was Stephanie Smart-Gittings, Esquire. The assistant solicitor was Kelvin Wright, Esquire.

This appeal follows.

ARGUMENT

The trial court erred in allowing evidence of prior difficulties/prior bad acts between appellant and the alleged victim, Monique Singleton, when the evidence was unduly prejudicial as propensity evidence.

The testimony of the alleged victim, Monique Singleton, was proffered to show what prior difficulties there were between her and appellant. Singleton said her first "tangle" with appellant was when both of their daughters got in a fight. Singleton said her daughter was on top of appellant's daughter and appellant tried to flip her daughter over on top of Singleton's daughter. (R. p. 145, l. 22 – p. 150, l. 12)

Appellant left the area for a couple of months to a year then she came back. Then Singleton backtracked and started talking about an incident that supposedly happened the day after the first incident. (R. p. 150, l. 13- p. 152, l. 23) She claimed appellant jumped on her and tried to push her eyes to the back of her head. Apparently, both got charged with disorderly conduct but appellant was cleared of her charges. (R. p. 152, l. 22 – p. 153, l. 13)

The assistant solicitor wanted the evidence in under the theory of res judicata. The trial judge corrected that and said res gestae. (R. p. 157, ll. 17-24) Ultimately, the trial judge ruled that he was not going to let the evidence in under Rule 404(b), SCRE because the evidence was not clear and convincing. Even though he found the evidence was not clear and convincing he said the evidence was admissible under the res gestae theory and State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996). (R. p. 176, l. 7 – p. 168, l. 4) In Adams, the court held that drug use prior to an armed robbery was admissible because the evidence established a relationship between the drug use and the robbery. Omitting the evidence would have fragmented the State's case as the armed robbery occurred immediately after the defendant ran out of crack cocaine.

While appellate counsel recognizes the holding in Adams, it is difficult to see how evidence cannot be admitted under Rule 404(b) because it is not clear and convincing but it can be admitted under the res gestae theory when it is still not clear and convincing. Adams did not say that. Also, the crack cocaine use in Adams was immediately prior to the armed robbery. In appellant's case the prior difficulties were several months to a year before the charge appellant was being tried for. As such, the evidence of prior difficulties in appellant's case went to show criminal propensity and was unduly prejudicial.

In State v. Gore, 283 S.C. 118, 322 S.E.2d 12 (1984) the court wrote:

> Under our system of justice, a conviction must be based upon evidence of the offense for which the accused is on trial rather than prior criminal or immoral acts. State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). Furthermore, where bad acts did not result in a conviction, guilty plea, indictment, or arrest of the appellant, this Court has limited the State's use of the evidence. State v. Smith, 279 S.C. 440, 308 S.E.2d 794 (1983). (Appellant's lover improperly related instance of the appellant's unconvicted sexual battery upon her in his trial for murder of another woman); *State v. Rivers*, 273 S.C. 75, 254 S.E.2d 299 (1979). (In trial for criminal sexual conduct with the prosecutrix the court erred in receiving testimony from the appellant's wife regarding his prior unconvicted acts of sexual misconduct on her); State v. Conyers, 268 S.C. 276, 233 S.E.2d 95 (1977). (Allegations that the appellant poisoned her first husband not admissible because the evidence was not clear and convincing); State v. Drew, 283 S.C. 118, 316 S.E.2d 367 (S.C.1984). (Cross-examination and reply testimony regarding unconvicted act of burning a combine not proper in criminal conspiracy trial for burning a business.)

As the court noted in State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991) and under Rule 403, SCRE, "Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis..." In State v. Carter, 323 S.C. 465, 476 S.E.2d 916 (Ct. App. 1996) the court held that evidence of a drug transaction involving the defendant four days before the transaction giving rise to the charge against the defendant was not admissible for any proper purpose.

In State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987) the court wrote:

It is well established that evidence of other crimes or prior bad acts is inadmissible to show criminal propensity or to demonstrate the accused is a bad individual.

CONCLUSION

Appellant's conviction for assault and battery in the second degree should be reversed.

Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of November, 2016.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Ebony Evelyn Castro states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. He has reviewed the record of appellant's trial before Judge George C. James, which was held on May 11, 2016 (Trial), and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, He asks the Court to relieve him as counsel for Ebony Evelyn Castro.

Respectfully Submitted,

Robert M. Pachak
Appellate Defender
ATTORNEY FOR APPELLANT

This 14th day of November, 2016.

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DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) Trial Transcript dated May 9-11, 2016;
(2) True-billed indictment

I certify that this designation contains no matter which is irrelevant to this appeal.

November 14, 2016

Robert M. Pachak
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CERTIFICATE OF COUNSEL

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

November 14, 2016.

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