

FEB 23 2017

SC Court of Appeals

STATE OF SOUTH CAROLINA)
 COURT OF HORRY)
)
 STATE OF SOUTH CAROLINA)
)
 VS.)
)
 BRIAN SPEARS,)
)
 DEFENDANT)

COURT OF GENERAL SESSIONS
 Warrant: J735111, J735112, J735113, J735114
 Indictment: 2007GS2603387, 2007GS2603388,
 2007GS2603389, 2007GS2603390

**AMENDED ORDER ON REMAND FOR
 RULE 403 HEARING
 (Correcting error on page 4)**

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This matter came before the court on December 8, 2016. It was remanded by the South Carolina Court of Appeals for an on-the-record 403 Balancing Test regarding testimony of a prior bad act. For the following reasons, the Court finds the probative value of the testimony is not substantially outweighed by the danger of unfair prejudice.

FACTS

On May 27, 2007, Brian Spears (Defendant) allegedly shot and killed Aaron Hammonds (Victim) on Ocean Boulevard in Myrtle Beach. Police arrived at the scene and, after speaking to witnesses, were able to create a composite sketch of Co-defendant Jeffery Bethea. Upon seeing the sketch on a news broadcast, Bethea turned himself into the police and began to cooperate. Bethea told police Defendant and Nathaniel Douglas were responsible for Victim's death. Both were subsequently arrested.

Evidence presented during pretrial motions and at trial established that Victim was a member of East Side Bloods, a gang in North Carolina. Defendant, codenamed Bos, was a member of another gang variously called 41-Curve, G.D. Folk Nation, and The Growth Development Gangster Site (hereinafter 41-Curve). Prior to his murder, Victim had recently been released from prison after serving a four year sentence. Victim pled guilty to accessory after the fact in connection with the murder of Eric Floyd. Before his murder Eric Floyd had been a high-ranking member of 41-Curve, Defendant's gang. The State argued Victim's death was a gang-related revenge killing for the death of Eric Floyd.

During pretrial motions, the State introduced evidence that on April 17, 2007, approximately one month after Victim was released from prison, Defendant shot Victim in a Walmart parking lot in Lumberton, North Carolina (Walmart shooting). Defendant argued the

prior shooting is not admissible under the South Carolina Rules of Evidence, Rules 403, 404(b), and 801. The Court took the matter under advisement and withheld its ruling pending the presentation of evidence at trial.

At trial, the State called Victim's sister, Danyell Hammonds (Hammonds) to the stand. She testified that one month before Victim's murder, Victim told her "Bos" shot him outside of a Walmart. Hammonds stated she knew Bos to be Defendant. According to Hammonds, Victim and Lemark Irons, a friend of Victim who was also with him when Victim was murdered, came to her house and ran to her room where she saw wet blood on Victim's shirt. Hammonds explained she believed the shooting had just occurred because the blood in the Victim's hand was still wet. She testified in an in camera hearing that before Victim was released from prison, a group of 41-Curve members told her that they were "going to get" Victim. This particular testimony was not presented to the jury.

Video of the Walmart shooting was shown to the court, however, the video was not published to the jury. The time stamp on the video showed the shooting took place at approximately 12:10 am. Hammonds testified Victim and Irons came running into the house shortly after midnight. While Irons was not with Victim at the time of the shooting, Irons was with Victim when they arrived at Hammonds' house. Hammonds stated, "He just, he just come in, they run to my room cause I'm pretty sure if anybody get shot they're going, you know, panic or whatever, they came to the room and everything and I was like 'what's wrong' and they was like 'I got shot at at Walmart.'" A few questions later she stated, "He told me, all he told me he came in the house, he was like I got shot at at Walmart, I had a little problem, he said I got shot at at Walmart. I was like what happened at Walmart, he was like I got shot at, man, and he was like, I was like well Aaron, who did it. He was like come on, man, you know who did it. I was like who and he was like Bos, man, Bos." Defendant objected to this testimony first as hearsay under Rule 801, then as a prior bad act under Rule 404. S.C. R. Evid. 404 and 801.

In order for hearsay to be admissible it must fit into an exception. The State argued that the testimony fit the excited utterance exception. An excited utterance is a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition. S.C. R. Evid. 803(2). To fit under the exception for an excited utterance, the statement must be contemporaneous while the declarant was still under the stress and

excitement of the event. The times in which the event took place and the statement was made do not have to be contemporaneous, like a present sense impression exception. S.C. Evid. 803(1). Therefore, to be an excited utterance the statement can be made while the event is still affecting the speaker and the speaker is still under the stress of the event, without having had sufficient time to calm down. (*See State v. Burroughs*, 328 S.C. 489, 492 S.E.2d 408, (SC App. 1997). "The mere fact that a statement was made some time after the incident occurred, as opposed to immediately thereafter, does not mean the statement cannot qualify as an excited utterance, provided the circumstances surrounding the statement indicate its reliability.")

Here, the Court determined Victim was still acting under stress when he made the statement. He ran into the house with fresh blood on his shirt and still bleeding from the gunshot wound. The shooting took place at approximately 12:10 am and Hammonds testified Victim ran into the house near midnight, putting the statement close to the time of the shooting. Considering the totality of the circumstances, the Court found these statements fall under the excited utterance exception to hearsay and are admissible.

Although the Court ruled the statement was admissible under a hearsay exception, the statement described a prior bad act. Therefore, to be admissible a second tier of analysis had to be done under Rule 404. The Court had to determine whether the Walmart shooting, a prior bad act described in the statement, was admissible under a 404(b) and under a 403 balancing tests.

South Carolina Rules of Evidence Rule 404(b) states: 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. S.C. R. Evid. 404. This rule is designed to prevent "propensity" arguments and bias amongst the jury. Evidence of a prior bad act under Rule 404(b) is relevant only to establish the motive, identity of the perpetrator, common plan or scheme, absence of mistake or accident, and intent. *Id.* A prior bad act that has not resulted in a conviction must be established by clear and convincing evidence. *State v. Holder*, 382 S.C. 278, 676 S.E.2d 690. In other words, to be admissible under a *Lyles* exception, a bad act must logically relate to the crime with which the defendant has been charged; if the defendant was not convicted of the prior crime, the prior bad act must be proven by clear and convincing evidence.

As previously noted, the State's theory of the case was that the murder of Victim was not a random gang shooting, but that there was a vendetta against Victim for his involvement in the

murder of Eric Floyd. The State argued it was an intentional taking of Victim's life with malice. Victim was released from prison for only one month before Floyd's fellow gang members shot Victim in the Walmart parking lot. Victim was shot in the arm and drove home where he told Hammonds that Defendant had shot him. A month later, Victim was murdered by members of Floyd's gang in Myrtle Beach. The Court found that these two acts were related. The Walmart shooting and the Boulevard shooting demonstrated there was a common scheme or plan. The prior bad act is admissible to show the intent of Defendant to kill Victim, as well as Defendant's motive, revenge. Hammonds' testimony corroborated this theory as she testified about her personal knowledge that members of 41-Curve wanted to kill Victim for his involvement with Floyd's death.

The Court found Victim's murder was not a random act. Regardless of whether the killing was planned for the night it occurred, there was a hit placed on Victim, and there was a common scheme or plan for his murder. The Court found the prior bad act indicates the absence of mistake – Defendant was targeting Victim in a gang-related revenge killing.

Additionally, the Court found the evidence of the prior bad act was clear and convincing. While there was no police report connecting Defendant to the Walmart shooting, Defendant was identified in the video of the shooting, Hammonds testified Defendant was involved in the shooting. Victim's statement naming Defendant as his shooter is clear and convincing evidence that Defendant was involved in the Walmart shooting.

Once deemed admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent, such evidence of prior bad acts may be excluded by the Court pursuant to Rule 403 if the danger of unfair prejudice to the defendant substantially outweighs the probative value of the relevant evidence. The Court ruled the statement was admissible in full and allowed the prior bad act to come in without doing a Rule 403 balancing test on the record.

Defendant was found guilty of Murder and three counts of Assault and Battery with Intent to Kill. The Court sentenced Defendant to thirty years' imprisonment for murder and twenty years' imprisonment for each count of Assault and Battery with Intent to Kill count to be served concurrently. An appeal followed.

The South Carolina Court of Appeals stated, "other than finding there was clear and convincing evidence of the prior shooting and Hammonds' testimony was admissible, the trial court made no specific findings on the record as to why the testimony had probative value, the nature of the unfair prejudice, or whether the probative value of the testimony was substantially outweighed by the danger of unfair prejudice." State v. Spears, 403 S.C. 247, 742, S.E.2d 878 (Ct. App. 2013). The Court of Appeals declined to conduct a de novo Rule 403 balancing test. Thus, the issue was remanded back to the trial court for an on-the-record balancing test pursuant to Rule 403, SCRE, to determine if the probative value of the prior shooting was substantially outweighed by the danger of unfair prejudice to Defendant. A writ of certiorari was denied by Order of the Supreme Court on September 11, 2014. Remittitur was issued September 23, 2014.

At issue on remand is Hammonds' testimony that Victim told her Defendant shot him at Walmart. The sole issue concerning this prior bad act testimony is whether the probative value is substantially outweighed by the unfair prejudice (SCRE 403). The South Carolina Court of Appeals remanded the matter in order for the trial court to do an on-the-record 403 balancing test. Consistent with the Supreme Court's ruling that an appellate court should not conduct its own balancing process, the Court of Appeals declined to conduct a de novo Rule 403 balancing test. State v. Spears, 403 S.C. 247, 742, S.E.2d 878 (Ct. App. 2013) (quoting State v. Colf, 337 S.C. 622, 629, 525 S.E.2d 246, 249 (2000)) ("It is difficult, if not impossible, for an appellate court to balance the interests at stake when the record does not contain the specific facts and circumstances necessary to a decision."). Therefore, the Court of Appeals remanded the matter for the trial court to conduct a 403 hearing.

Analysis

Rule 403 of the South Carolina Rules of Evidence states: "[a]lthough 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 considerations of undue delay, waste of time, or needless presentation of cumulative evidence." S.C. R. Evid. 403. All relevant evidence will be prejudicial to some effect; however, the test is whether the probative value is substantially outweighed by the danger of unfair prejudice. Unfair prejudice means an undue tendency to suggest a decision on an improper basis. State v. Stokes, 381 S.C. 390, 673 S.E.2d 434 (2009).

A prior bad act has the potential to cause unfair prejudice to the defendant and bias the jury. The danger is substantially enhanced when the prior bad act is strikingly similar to the one which the defendant is being tried. It is clear the evidence of the Walmart shooting is prejudicial to Defendant. However, the rule does not state that any testimony which brings a danger of prejudice should be excluded, the rule states that the danger of unfair prejudice must substantially outweigh the probative value for the evidence to be excluded.

Defendant was not convicted of the Walmart shooting. The only evidence presented to the jury about the Walmart shooting was from Hammonds, stating that Victim told her Defendant had shot him. The jurors were not shown the video of the Walmart shooting. The jury is able to judge the credibility of each witness, they are free to believe all, some, or none of the testimony of any witness presented. Defendant argues the State is making a propensity argument, suggesting the evidence is being used simply to show he shot him once so it must have been Defendant who shot him again. It is well-settled law that a propensity argument is inadmissible. However, in State v. Dennis the South Carolina Court of Appeals held, "One of the accepted bases for the admissibility of evidence of other crimes arises 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 the explanatory of the crime charge 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, and where evidence is admissible to provide this full presentation of the offense, there is no reason to fragmentize the event under inquiry by suppressing parts of the res gestae." 402 S.C. 627, 742 S.E.2d 21 (S.C. Ct. App., 2013). The State's theory behind the murder was that the shooting was a gang related revenge-killing. Victim's murder was not a random act of gang violence, instead, the murder was a planned hit on Victim's life. The State did not use the evidence of the Walmart shooting to identify Defendant in the Myrtle Beach shooting. The State was not making the argument that the perpetrator was necessarily Defendant because he shot at Victim in a prior instance. The Walmart shooting was admitted because it was a part of a common scheme or plan to kill Victim, and it went to the motive and intent of Defendant.

Additionally, the danger of unfair prejudice is substantially decreased by other evidence presented at trial. There were multiple eye witnesses and testimony to identify defendant as the shooter in the Myrtle Beach shooting. Tim Smith, a cell mate of Defendant in jail, testified

Defendant admitted to killing Victim. Smith testified Defendant told him of the plan to kill Victim—
—Defendant was upset because Victim had killed his friend and that when he learned Victim was
in Myrtle Beach for Bike week, Defendant and several friends loaded up to "take care of [Victim]." Smith testified, "[Defendant] said that, that they had got up with the guy and this fellow who used to be his partner named Bird said that he was supposed to take care of the guy and he couldn't do it. So he said he run back to the car and said he was parked at the K-Mart parking lot. Said he run back to his car and got his gun come back; and, you know, he said they was going down Ocean Boulevard and said that he was running through the crowd and passed his buddies and caught up with the guy that they had been arguing with, the guy that killed his friend; and he said he did what they called wetting' him up, he said he wet him up and evidently, you know, he shot three other people at the time you know."

Co-defendant Jeffrey Bethea testified he was there the night of the shooting. He claimed he and Defendant "hyped" each other up to take out a member of the rival gang. After seeing Victim and speaking to Lemark Irons they decided to attack the East Side Bloods and kill Victim. Bethea testified, "I pulled out a knife. I was, I was looking for Lemark [Irons] and as we walked up, when we was coming up [Defendant] pulled out his gun." Bethea testified Defendant pulled out his small caliber pistol from his right side waistband, which is consistent with other testimony, and shot Victim.

Brittney Maynor, Victim's girlfriend, was at the Boulevard with Victim when he was murdered. She testified that a man dressed in a red shirt and a red hat shot her boyfriend. Bethea said Defendant was wearing a red shirt. Nathaniel Douglas testified Defendant was dressed in three shirts, with a red shirt worn on the outside and a black and red New York Yankees hat. There was over-whelming evidence presented at trial that Defendant was the shooter. The prejudicial effect of the Walmart shooting is thus diminished in light of this evidence. The danger of unfair prejudice and the undue tendency to suggest decision on an improper basis is nullified by the fact that the jury could have found Defendant guilty from the testimony of multiple witnesses stating either the Defendant was the shooter or Defendant admitted to the shooting, even without the introduction of the Walmart shooting.

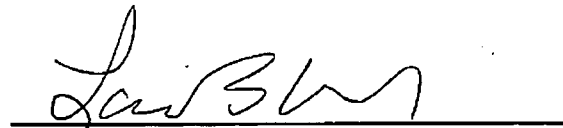
At the hearing, Defendant brought up for the first time his objection under Rule 403 that the testimony, besides being unfairly prejudicial, was cumulative. Defendant admits there is

evidence against him, however, he argues that the introduction of the Walmart shooting is a needless presentation of cumulative evidence. But, in order to exclude the introduction of evidence because it is cumulative, the evidence must be needless. S.C. R. Evid. 403. Again, the testimony of the prior shooting goes to the theory that it was a gang-related revenge killing. It shows that there was an intent and plan to kill Victim. The prior shooting shows the full picture of the theory of the case. Although Defendant could have been convicted without the evidence, the rules of evidence do not prevent a party from presenting other pieces of evidence to bolster its case.

The Court finds the evidence of the Walmart shooting is overwhelmingly probative. It was a necessary part of the evidence to tell the whole story of the events that took place and led up to the killing of Victim. The probative value goes to the motive, intent, common scheme and plan, and the absence of a mistake or accident. The fact that this was a revenge-killing rather than a random act of gang violence is the difference between Murder and Voluntary Manslaughter. The evidence of the prior shooting reveals Defendant's intent was not to scare or inflict injury, but to kill Victim. Moreover, it clarifies that the Boulevard shooting was neither an accident nor mistake. The shooting was a deliberate, planned, and calculated murder of Victim.

I find and conclude the danger of unfair prejudice does not substantially outweigh the probative value of the evidence. Nor, in light of the evidence presented, is there the undue tendency to suggest a decision on an improper basis brought on by a propensity argument. For the foregoing reasons, the Court finds the evidence of the Walmart shooting to be highly probative and the danger of unfair prejudice to be minimal in light of the circumstances.

IT IS SO ORDERED!



The Honorable Larry B. Hyman
Presiding Judge
Fifteenth Judicial Circuit

February 9, 2017

Conway, South Carolina

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