ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Berkeley County

Honorable Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LEE DELL BRADLEY,

APPELLANT

APPELLATE CASE NO 2016-001519

INITIAL BRIEF OF APPELLANT

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2.

Whether the trial court erred in admitting the irrelevant, highly prejudicial testimony of an expert in "the impact of trauma, domestic violence" who testified that a woman's risk of being murdered increases if a woman prepares to leave her abuser?

STATEMENT OF THE CASE

On June 28, 2016, a Berkeley County grand jury indicted appellant Lee Dell Bradley for murder. R. ___ (indictment). On July 11, 2016, appellant was tried before the Honorable Deadra L. Jefferson and a jury. Tr. 1. Anne M. Williams and Wilton H. McNeely represented the State. Tr. 1. Debra K. Littlejohn and Keisha V. White represented appellant. Tr. 1. The jury convicted appellant. Tr. 625, l. 14 – 626, l. 6. Judge Jefferson sentenced appellant to life imprisonment. Tr. 641, ll. 19 – 25. This appeal follows.

ARGUMENT

1.

In this murder case where appellant admitted his girlfriend died during an argument, the trial court erred in admitting evidence of appellant's nearly two-year-old conviction for domestic violence where this evidence was inadmissible as character evidence and the conviction was more unfairly prejudicial than probative because of its remoteness.

Factual and Procedural Background

Lee Dell Bradley ("Bradley") told the police that his girlfriend died by accident during an argument. (State's Ex. 69, 71). Bradley and Frances Lawrence ("Lawrence") lived together. Tr. 222, ll. 3 – 4. On May 23, 2014, Bradley called 911. Tr. 109, l. 19 – 110, l. 11. Bradley told the 911 operator that he and Lawrence got into a fight the night before. (State's Ex. 69). Lawrence grabbed a knife and tried to stab Bradley. (State's Ex. 69). He tried to take the knife from her. (State's Ex. 69). She fell on the knife and it entered her chest, killing her. (State's Ex. 69). Bradley described it as "a freak accident." (State's Ex. 69).

Bradley told the operator the address. (State's Ex. 69). He did not call for an ambulance when Lawrence fell on the knife because he was scared. (State's Ex. 69). The operator told Bradley to stay on the phone, but the call was disconnected. (State's Ex. 69). Bradley was arrested in North Carolina on May 29, 2014, and waived extradition to South Carolina. Tr. 460, ll. 4 – 19.

The police interviewed Bradley after they brought him to South Carolina. Tr. 154, l. 12 – 157, l. 12. The interview was recorded. Tr. 162, ll. 5 – 22. (State's Ex. 71). Bradley told the police the same thing he told the 911 operator—that Lawrence fell during a struggle and the knife accidentally went into her chest. (State's Ex. 71). Lawrence threatened to kill him.

(State's Ex. 71). After Bradley defended himself from Lawrence lunging at him with the knife, she slipped on a blue rug in the doorway to their bathroom. (State's Ex. 71). Bradley admitted their relationship had its "ups and downs" and that Lawrence thought he was having an affair. (State's Ex. 71).

Before trial, Bradley filed a written motion to exclude prior bad acts. R. ___ (Motion to Exclude Prior Bad Acts). Appellant anticipated that the State would try to introduce evidence of prior domestic violence calls to Lawrence and Bradley's house. R. ___ (Motion to Exclude Prior Bad Acts). Appellant argued that the evidence was not relevant except to show his propensity to commit the crime and was inadmissible under Rule 404 and State v. Sweat, 362 S.C. 117, 606 S.E.2d 508 (Ct. App. 2004). R. ___ (Motion to Exclude Prior Bad Acts). The trial judge refused to hear any proffer or argument on appellant's motion before trial and explained that she would take the matter up *in camera* during the trial. Tr. 29, l. 17 – 30, l. 5.

Before Officer Stacey Cross ("Cross") took the stand, the solicitor advised the court that she intended to introduce the prior domestic violence incidents "in the midst of her testimony." Tr. 319, ll. 16 – 19. Judge Jefferson told the solicitor to stop when that point arrived so that she could "take it up *in camera.*" Tr. 319, ll. 20 - 21.

Officer Cross testified that she was dispatched to the residence on the day Bradley called 911 to report Lawrence's death. Tr. 321, l. 25 – 322, l. 23. She entered the house with two other officers. Tr. 324, ll. 1 – 15. They found Lawrence on the bathroom floor and Officer Cross described the scene. Tr. 325, l. 11 – 3. The solicitor then told Judge Jefferson there was an issue of law and the jury was sent out of the courtroom. Tr. 326, ll. 7 – 16.

The State then proffered Officer Cross's testimony about two other times she went to the residence. Tr. 326, l. 21 – 327, l. 7. Officer Cross responded to domestic violence calls in 2009

and 2012. Tr. 327, ll. 12 – 15. The trial judge ultimately excluded evidence related to the 2009 call as too remote, but admitted Officer Cross's testimony about the 2012 incident. Tr. 355, l. 11 – 362, l. 6.

During the proffer of the 2012 incident, Officer Cross stated she responded to Bradley and Lawrence's residence and Lawrence was outside. Tr. 330, ll. 2 – 13. Bradley was in the house sleeping. Tr. 330, ll. 6 – 13. Lawrence was afraid to go inside of the house and claimed Bradley slapped her. Tr. 330, l. 6 – 331, l. 6. Bradley told Lawrence that if she called the police, he would kill her. Tr. 331, l. 16 – 332, l. 1. The police arrested Bradley for criminal domestic violence. Tr. 331, ll. 4 – 6. On cross-examination, the officer admitted Lawrence had no injuries. Tr. 335, ll. 8 – 11.

At the conclusion of the proffer, appellant argued that these prior bad acts were inadmissible under Rule 404(b) and State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). Tr. 338, l. 19 – 343, l. 4. Defense counsel stated, "It is nothing more than the State trying to introduce prior crimes of bad acts to prove a propensity." Tr. 338, ll. 21 – 23. Appellant argued the applicability of Sweat. Tr. 339, l. 2 – 341, l. 9. Appellant pointed out the evidence had no logical relevancy to any material fact at issue and was only offered to show Bradley's propensity to act in conformity with his prior conduct. Tr. 341, l. 6 – 342, l. 23. Finally, appellant argued the evidence was too remote and more unfairly prejudicial than probative. Tr. 342, l. 1 – 343, l. 4. The State claimed it was offering the prior bad acts to rebut "the claim of accident." Tr. 343, ll. 7 – 16.

The trial judge initially indicated that the 2012 incident was too remote. Tr. 352, ll. 7 – 16. The solicitor asked to introduce evidence that Bradley was convicted of criminal domestic violence for the 2012 incident through the clerk of court. Tr. 352, l. 17 – 355, l. 9. After taking

a recess to consider the matter, Judge Jefferson returned to the bench and ruled that Officer Cross could testify about the 2012 incident. Tr. 355, l. 10 – 362, l. 6. The court found the evidence fell within the Lyle exception to rebut accident. Tr. 355, l. 10 – 362, l. 6. The trial judge told the solicitor she expected the State to introduce evidence of Bradley's guilty plea. Tr. 355, l. 10 – 362, l. 6. The court also found Officer Cross's testimony was

> . . . logically relevant to this incident, and for the jury to have a full picture of the nature of the relationship that existed between the defendant and the deceased, and in connection with the conviction, it does more than being an incidental reference to something that would need to be proven, and it rises above what would be considered just in the nature of character evidence.

Tr. 357, ll. 4 – 11. After, defense counsel attempted to mitigate the ruling regarding evidence of Bradley's conviction, the trial judge interrupted, ordered the jury brought into the courtroom, and stated, "Your objection is always preserved." Tr. 359, l. 12 – 362, l. 6.

Before the jury, Officer Cross testified that she responded to Bradley and Lawrence's house in September 2012 for a domestic violence call. Tr. 362, l. 7 – 363, l. 1. Lawrence was "whispering. . . . visibly shaken. . . . upset, crying." Tr. 363, ll. 17 – 19. Bradley was in the home. Tr. 363, ll. 20 – 21. The police arrested Bradley. Tr. 364, ll. 10 – 13. The next witness was an employee from the clerk of court's office. Tr. 365, ll. 13 – 24. The clerk testified that Bradley had a conviction from 2012 for criminal domestic violence. Tr. 366, l. 15 – 367, l. 20. Lawrence's sisters testified that Lawrence told them she was going to move, had begun packing her things, and obtained a phone with a number that Bradley did not know. Tr. 242, l. 25 – 243, l. 16. Tr. 302, l. 2 – 303, l. 3. As will be discussed in more detail in Issue 2 of this brief, the State's final witness was a purported expert on domestic violence who testified that a woman's risk of being murdered by an abuser increases if she attempts to leave. Tr. 507, l. 20 – 511, l. 13.

During her closing argument, the solicitor told the jury that Bradley "can not show this woman any respect," and then asked, "But what does it tell you about Lee Bradley?" Tr. 545, ll. 18 – 23. The solicitor answered her own question:

> There's only two people there when he muurdered her; this is true. But what can you tell about the way he behaved toward her during the murder. **Look at the way he treated her when she was alive.** Look at the way he treated her and talks about her after she is dead. There is no statement where he says anything with affection or respect about this woman.

Tr. 545, l. 24 – 546, l. 5 (emphasis added). When the solicitor addressed the defense of accident during her closing, she never mentioned the 2012 incident. Tr. 551, l. 8 – 552, l. 11.

Discussion

The evidence of the 2012 incident was wrongfully admitted because it proved only Bradley's propensity to kill Lawrence. This evidence was inadmissible under Rule 404(a) and (b) and South Carolina's Lyle jurisprudence. The nearly two year-old incident was also too remote to be admitted and the unfair prejudice that the jury would convict appellant because he was a bad person outwieghed its negligible probative value. Rule 403, 404, SCRE.

By its plain text, Rule 404 is primarily a rule of exclusion. Rule 404, SCRE. The rule's title says, "Character evidence not admissible to prove conduct." Rule 404(a), SCRE. Rule 404(a) begins with the premise that, "Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion. . . ." Rule 404(a), SCRE. If the State's purpose in offering the evidence was to prove that because Bradley's past abuse of Lawrence meant he had a bad character and made it more likely that he murdered her, then Rule 404(a) bars its admission.

Rule 404(b) begins by repeating the bar on propensity evidence. Rule 404(b), SCRE. The rule 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." Rule 404(b), SCRE. The State contended, and the trial judge agreed, that the 2012 incident fell into Rule 404(b)'s exception to prove absence of accident. Rule 404(b), SCRE. The trial judge held the 2012 incident "rises above what would be considered just in the nature of character evidence." Tr. 357, ll. 4 – 11.

Nothing about the 2012 incident bore on the issue of accident. The pathologist's testimony about the angle and shape of the wound is the type of evidence that tends to disprove accident. Tr. 432, l. 15 – 436, l. 15. A nearly two year-old altercation between romantically involved partners bears no logical connection to whether Lawrence slipped and fell on the knife or Bradley stabbed her. The only logical inference that can be drawn is the one forbidden by Rule 404: Bradley abused her before, so he must have killed her this time. In his statement, Bradley freely admitted they had a heated argument and that Lawrence thought he was seeing another woman. Had Bradley claimed that Lawrence slipped in the kitchen while cooking and fell on the knife, then the prior incident would gain some marginal relevancy. But under the circumstances of this case, the 2012 domestic violence conviction was propensity evidence.

As argued by trial counsel, the 2012 conviction was also too remote and therefore more unfairly prejudicial than probative. State v. Brooks, 341 S.C. 57, 62, 533 S.E.2d 325, 328 (2000) (holding that even if a prior bad act falls under a Lyle exception, "it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant."). In the case cited to the trial judge, the prior domestic violence conviction that was admitted occurred, as a practical matter, eleven days before the charged crime. State v. Sweat, 362 S.C. 117, 130, 606 S.E.2d 508, 515 (Ct. App. 2004). In Sweat, the defendant was arrested for criminal domestic violence in October and stayed in jail until December. Id. Eleven days after

he was released, he assaulted the victims. Id. The Court noted that the trial judge excluded other instances of domestic violence. Id. at 122, 606 S.E.2d at 511. Even the practically eleven day-old incident which was admitted the court called "not strictly necessary to the State's case." Id. at 127, 606 S.E.2d at 514.

Another case with similar facts demonstrates that Bradley's conviction was too remote. State v. Smith, 337 S.C. 27, 522 S.E.2d 598 (1999). In Smith, the defendant was charged with murder after shooting at his wife and hitting his infant daughter after an argument. Id. at 29, 522 S.E.2d at 599. The defendant's wife told the police immediately after the incident that he got mad, shot at her, and had threatened to kill both of them. Id. at 29-30, 522 S.E.2d at 599. At trial, the defendant's wife recanted. Id. She testified that the defendant was unloading his pistol and the shooting was accidental. Id.

The State sought the admission of four prior criminal domestic violence convictions "to establish appellant's state of mind at the time of the shooting and to rebut his claim of accident." Id. at 31-32, 522 S.E.2d at 600. The shooting occurred in October 1996 and the trial court only admitted one of the four convictions—from July 1996—and the Supreme Court affirmed. Id.

In Smith, the length of time between the prior conviction and the shooting was three months. Id. Here, almost two years had passed since Bradley's conviction. The remoteness of Bradley's conviction lessens any probative value and increases its unfair prejudice. Furthermore, the circumstances of the claimed accident made the prior conviction in Smith far more relevant than this case. In Smith, the accident claimed at trial was divorced from any argument or struggle. It was an accidental firing of a pistol. Here, the State's evidence included appellant's statement admitting the couple had an argument and there was a struggle over the knife. The remote prior conviction was not logically relevant to the circumstances of this accidental death.

In this close case where the jury deliberated overnight and asked to be recharged on the law, this error requires reversal. Tr. 615, l. 21 – 625, l. 13.

2.

The trial court erred in admitting the irrelevant, highly prejudicial testimony of an expert in "the impact of trauma, domestic violence" who testified that a woman's risk of being murdered increases if a woman prepares to leave her abuser.

Lawrence's sisters testified that Lawrence told them she was going to move, had begun packing her things, and obtained a phone with a number that Bradley did not know. Tr. 242, l. 25 – 243, l. 16. Tr. 302, l. 2 – 303, l. 3. As its last witness in this trial, the State called a psychologist and qualified her as an expert in the "impact of trauma, domestic violence." Tr. 503, l. 15 – 508, l. 1. The State's last question to its last witness was:

> Q. What does the research say about the period of time when a woman is getting ready to leave her abuser?
>
> A. **So in domestic violence relationships**, when there—there are **risk factors** for the potential—for future escalation of harm, even homicide. And when there is a—a relationship that is controlling, or there is this other kind of power of dynamics, **when a woman is—have left in the past, or in the process of attempting to leave, there is an increased risk of homicide.**
>
> MS. WILLIAMS: Thank you. Nothing further.

Tr. 511, ll. 4 – 14 (emphasis added). This testimony is purely propensity evidence. As such, it is irrelevant, highly prejudicial, and should have been excluded.

Before the psychologist testified, appellant objected to the entirety of her testimony. Tr. 494, l. 24 – 499, l. 8. Defense counsel cited Rules 402 and 403 in her argument that the psychologist's testimony was not relevant, highly prejudicial, and was offered to confuse and mislead the jury. Tr. 494, l. 24 – 499, l. 8. The State responded that the expert knew more about domestic violence than the average juror and that the jury needed to understand about "periods of time when victims are getting ready to leave, and how violence often escalates in

domestic violence relationships and what that means." Tr. 496, l. 1 – 497, l. 7. The solicitor offered the trial judge a misinterpretation of State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013) "and its prodigy" and claimed that the testimony was admissible because the expert would not talk about the specific facts of the case. Tr. 497, ll. 14 – 21.

The trial judge unfortunately agreed, finding that, "Experts, along this line, are allowed to talk broadly about an issue, but not specifically." Tr. 499, ll. 15 – 20. Judge Jefferson stated this evidence is not "problematic. It's done all the time anymore." Tr. 499, l. 24 – 500, l. 1. She said the expert could "educate [the jury] regarding what we have now termed the cycle of domestic violence." Tr. 500, ll. 1 – 5. The court further ruled that the evidence was relevant and more probative than prejudicial. Tr. 500, ll. 17 – 24.

Except for a short restroom break, the psychologist testified immediately after the trial judge's ruling.[1] Tr. 499, l. 9 – 503, l. 16.

Rule 402 provides that irrelevant evidence is inadmissible. Rule 402, SCRE. The expert's testimony is rank propensity evidence with no relevance to the factual issues at trial. The invited inference to the jury is that because women are at a greater statistical risk when preparing to leave their abuser, then appellant must have murdered Lawrence. This inference is not permitted. A defendant must be tried on his guilt or innocence as proven by the evidence at

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[1] Appellant anticipates the State will employ a "gotcha" issue preservation red herring in its brief. See Atlantic Coast Builders v. Lewis, 398 S.C. 323, 332-33, 730 S.E.2d 282, 287 (2012) (Toal, C.J., concurring in part and dissenting in part). When the State asked the trial judge to qualify the expert, defense counsel did not object. Tr. 508, ll. 2 – 12. The State will likely seize on this failure to object and claim it waived appellant's argument that the entirety of the expert's testimony was inadmissible. The trial judge heard comprehensive argument that the expert's testimony was inadmissible, then ruled. No new facts or arguments were necessary, and there was no need to object to qualification if the entire testimony was irrelevant. Furthermore, the trial judge indicated at the end of the trial that she understood the objection was to the entire testimony by stating her opinion that the issue was preserved. Tr. 632, ll. 8 - 10.

trial, not statistical probabilities. Such evidence has no probative value and is unfairly prejudicial. Rule 403, SCRE.

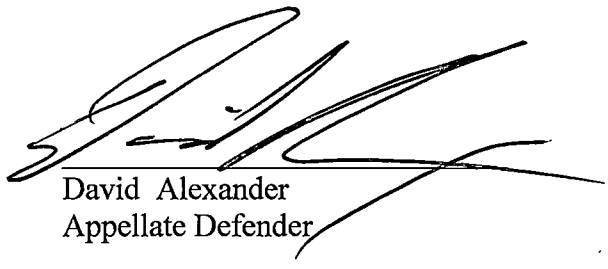
The expert's testimony in this case is no more admissible than the profiling testimony in the recent case of State v. Huckabee, ___ S.C. ___, ___ S.E.2d ___, 2017 WL 1000905 (Ct. App. Mar. 15, 2017). In Huckabee, a SLED agent testified as an expert witness that the defendant fit the profile of the person who committed the crime. Id. The expert told the jury that the "overwhelming majority of sexual offenders are male." Id. He also opined as to the age range of the offender, which matched the male defendant. Id.

This Court ruled that "profiling testimony is not probative of an individual defendant's guilt in a particular case." Id. The Court conducted exhaustive research on this issue in other jurisdictions and determined that such profiling testimony is condemned as propensity evidence. Id. This Court ruled the evidence should have been excluded under Rule 403. Id.

Just as in Huckabee, the psychologist's testimony was irrelevant profiling evidence that suggested to the jury they could convict appellant because of a propensity for abusers to murder their spouses. This evidence was unfairly prejudicial because it would "suggest a decision on an improper basis." State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008). The improper basis here was a vague increased risk of homicide instead of the evidence before the jury. This Court should reverse.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's conviction and remand this case for a new trial.



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This 31st day of March, 2017.