STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Honorable Larry B. Hyman, Circuit Court Judge

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SC Court of Appeals

THE STATE, RESPONDENT,

V.

BRIAN KENDRICK SPEARS, APPELLANT

APPELLATE CASE NO 2017-000480

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the lower court in its order on remand was incorrect in ruling that the probative value of the prior similar bad act was not outweighed by the danger of unfair prejudice?

STATEMENT OF THE CASE

Appellant was convicted of murder and three (3) counts of assault and battery with intent to kill after a jury trial held before the Honorable Larry B. Hyman, Jr., on May 10-13, 2010, in Horry County. A sentence of thirty (30) years was imposed for murder and twenty (20) year sentences were imposed on the remaining charges.

Appellant appealed his convictions and submitted a final brief on September 12, 2011. Respondent submitted its final brief also on September 12, 2011. Oral argument was heard in the Court of Appeals on January 17, 2013. On April 17, 2013, the court issued an opinion remanding the case to the trial court for it to conduct an on-the-record balancing test under Rule 403, SCRE to determine whether the probative value of the prior bad act of a shooting was substantially outweighed by the danger of unfair prejudice.

On April 26, 2013, respondent filed a petition for rehearing en banc. On May 2, 2013, appellant filed a petition for rehearing. Both petitions for rehearing were denied on June 14, 2013. Appellant filed a petition for writ of certiorari on July 15, 2013. The State filed a petition for writ of certiorari on July 12, 2013. On August 1, 2013, appellant filed a return to the State's petition. On August 14, 2013, the State filed a return to appellant's petition. On September 11, 2014, the South Carolina Supreme Court issued an order denying the petitions of both parties.

The rehearing on remand for the Rule 403, SCRE balancing test was not heard until December 8, 2016. Barbara Pratt, Esq. again represented appellant and Thomas Terrell, Esq. represented the respondent.

On February 9, 2017, the Honorable Larry B. Hyman issued his amended order on remand for the Rule 403 hearing. He found that the probative value of the prior similar bad act was not substantially outweighed by the danger of unfair prejudice. He also found there was not

an undue tendency to suggest a decision on an improper basis brought on by the propensity argument.

This appeal follows.

ARGUMENT

The lower court in its order on remand was incorrect in ruling that the probative value of the prior similar bad act was not outweighed by the danger of unfair prejudice.

The victim was shot and killed in Myrtle Beach while he was visiting there with some of the gang members he was with from Lumberton, North Carolina. Appellant, Jeffrey Bethea, and Nathaniel Douglas were in a rival gang also from Lumberton and they, too, were visiting in Myrtle Beach. No one was really quite sure who did the shooting.[1] The police made a composite sketch of the suspected shooter that resembled Jeffrey Bethea. Nathan Douglas testified for the State and implicated Bethea. Bethea testified for the State in exchange for more lenient treatment and implicated appellant. Appellant's defense was the Bethea was the one (1) shooter.

Eight shell casings were recovered from the crime scene and three bullets were recovered from the victim's body. (R. p. 79, line 9- p. 81, line 15). They were all identified as coming from a .25 caliber semi-automatic weapon. (R. p. 349, line 19- p. 350, line 22). It was the own State's witness, Nathaniel Douglas, who said appellant had a titanium chrome handgun with a lot of black on it. It was a medium sized automatic handgun the size of a .380. He said everybody in the car with him that night had a handgun. (R. p. 220, line 10- p. 221, line 22).

On cross-examination, Douglas said it was Bethea that had gotten into an argument with a rival gang member that day and appellant was calm. (R. p. 228, line 4- p. 231, line 6). Douglas said he was 19 at the time, appellant was 20, and Bethea who was the leader was much older. (R. p. 232, line 17- p. 233, line 1). When they got back home after the shooting, Bethea said he smoked sausage and nobody had to worry about it now. "Smoked sausage" meant the victim was

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[1] Respondent admitted in his brief that the "State proceeded under the theory that either Appellant or Bethea shot victim… (Brief of Respondent, p. 8)

stiff. Bethea was bragging. Nobody else was. (R. p. 249, line 1- p. 250, line 13). Douglas also said Bethea told him he needed to tell the police that appellant did it but he wouldn't do it. (R. p. 250, line 24- p. 251, line 11).

The assistant solicitor also had to try to make a point that appellant made rap lyrics about the incident to try to corroborate Bethea's version of the shooting blaming appellant. (R. p. 324, line 7- p. 325, line 16). Nathaniel Douglas explained, however, that rap music is just a reflection of what is going on and is fiction. If it weren't all rappers would be in jail. (R. p. 252, line 18, p. 253, line 4).

Jeffrey Bethea testified that he was charged with murder and three attempt to kill charges. He pled guilty to voluntary manslaughter in exchange for his promise to testify. (R. p. 355, lines 10-23). He said he turned himself in because he saw the composite drawing of himself in the newspaper. When he turned himself in, he was arrested. He pinned the murder on appellant in his interviews with the police. (R. p. 372, line 15- p. 373, line 23). Earlier it was noted that the assistant attorney general said the State's theory of the case was that either Bethea or appellant shot the victim. One could also theorize that Bethea killed the victim, since his composite drawing became public, and he decided to pin the murder on appellant to get more favorable for himself. Appellant also was not known to use a .25 caliber handgun.

After the State rested its case, the defense called Alexis Brown to testify. The victim was the father of her young son. She was with the victim the night he was killed. (R. p. 445, line 10- p. 446, line 12). She identified Jeffrey Bethea as the person who shot the victim from the composite drawing of him. (R. p. 449, line 6- p. 450, line 10).

Deandre Bishop testified that he came into contact with Jeffrey Bethea while they were both at J. Reuben Long Detention Center. Bethea told him he did what he was charged with "but he wasn't going down by hisself." (R. p. 458, line 21- p. 460, line 22).

Appellant testified he did not shoot the people he was charged with shooting. (R. p. 468, lines 3-10). He talked about the altercation Bethea had with a rival gang member at the beach. (R. p. 476, lines 6-11). Appellant said he did not see the actual shooting. After it happened he went back to where they parked and they all went back to Lumberton. (R. p. 478, lines 5-24). At a cookout back in Lumberton, he overheard Bethea commenting on the victim as being "smoked sausage and we ain't got to worry about him no more…" (R. p. 479, lines 18-21). He explained that rap music does not always come from personal experience but from what people want to hear. (R. p. 490, lines 7-14). He said he brought a gun with him to the beach but left it in the car. (R. p. 491, lines 10-16). "It was a black, faded black 380 11 shot." (R. p. 502, lines 19-20).

THE ARGUMENT PRESENTED ON DIRECT APPEAL

The trial court erred in admitting evidence that appellant shot the victim about a month prior to the shooting death for which appellant was on trial because it was unfairly prejudicial under Rule 403, SCRE.

"Appellant, Jeffrey Bethea, and Nathaniel Douglas were in a gang from the southside of Lumberton, North Carolina. The victim was in a competing gang from the eastside of Lumberton. On May 27, 2077, the victim, his girlfriend, and several others decided to drive down to Myrtle Beach to see bike weekend. Appellant, Bethea and Douglas were also in Myrtle Beach that weekend. The victim was shot and killed that evening and three bystanders were hit by stray bullets. The State's theory of the case was one of accomplice liability and that the shooting was done by appellant, Douglas and Bethea. The killing was thought to have been done in retaliation because the victim had killed a member in appellant's gang. Nathaniel Douglas testified for the State and implicated Bethea. Bethea testified for State in exchange for more lenient treatment and implicated appellant. Appellant's defense was that Bethea was the (1) shooter.

In an effort to prove that appellant was the shooter, the State wanted to put into evidence testimony from the victim's sister that appellant shot the victim at a Walmart parking lot in Lumberton about a month prior to the shooting in Myrtle Beach.

At an in camera hearing, Danyell Hammonds, the victim's sister, testified that the victim came home one night in April of 2006 with blood on his shirt and said that he got shot at Walmart by "Bos" who is appellant's nickname. She also said her brother was in a rival gang and had gotten out of prison about a month prior to this shooting. He had been convicted of accessory

after the fact of murder. The victim in that case was in the gang appellant belonged to. (R. p. 141, line 6- p. 144, line 17).

After much discussion, the trial court held that the victim's sister could testify to what her brother told her because it was an excited utterance under Rule 803(2), SCRE. (R. p. 183, line 11- p. 184, line 14). Defense counsel had argued earlier that the evidence should not come in under Rule 403, SCRE because of unfair prejudice. (R. p. 182, lines 7-10; p. 159, line 20- p. 160, line 1). Later, the trial court allowed the solicitor the opportunity to put on the record that she was also putting in this evidence as a prior bad act under Rule 404, SCRE. She said it went to motive, intent, common scheme of plan, continuous scheme of plan and identity. The trial judge found there was clear and convincing evidence of the prior bad act. (R. p. 186, line 18- p. 187, line 14). The decision to admit this evidence was in error.

Rule 403, SCRE provides that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice..." "Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis." State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146 (1991). If we assume that the victim's sister is telling the truth about what her brother told her,[2] there is still the danger that the jury will conclude that, if appellant shot the victim once, he must also be the one who shot him a second time.

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 evidence. State

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[2] In "most cases, proof that the event occurred is furnished either by testimony other than the declarant, or by circumstantial evidence that something out of the ordinary occurred." Weinstein's Federal Evidence §803. 04 [2][a] at p 803-20-21 (March, 1977 ed).

> 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 were not admissible because the evidence was not clear and convincing); State v. Drew, 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.)

The Court went on to conclude that "when, as here, the previous alleged bad act is strikingly similar to the one for which the appellant is being tried, the danger of prejudice is enhanced."

The trial court in this case failed to conduct a balancing test to determine whether the probative value of the prior bad act substantially outweighed its prejudicial effect. See, State v. Colf, 337 S.E. 2d 622, 525 S.E. 2d 246 (2000); Green v. State, 338 S.C. 428, 527 S.E.2d 98 (2000). At the end of the case the trial court remarked that, "I don't know the basis for the jury's finding of guilt, whether it be that the jury felt that you were the shooter or you were an accomplice." (R. p. 577, lines 10-12). Appellate Counsel would suggest that the basis was the unfair prejudice of the prior bad act."

THE COURT OF APPEALS OPINION ON DIRECT APPEAL

The Court of Appeals opinion is reported at 403 S.C. 247, 742 S.E. 2d 878 (2013). It should be noted the Court found that the trial court failed to conduct an on-the-record balancing test concerning the prior bad act testimony and that this failure was not harmless. (emphasis supplied). The Court of Appeals explained as follows:

> We note the potential prejudice to Spears upon the introduction of this evidence. Spears was tried for shooting and killing Victim. The prior bad act testimony involved Spears shooting the Victim a month before the incident herein. Based upon these similarities, the jury could have determined Spears was guilty on an improper basis by relying on the Wal-mart testimony as propensity evidence. See *State v. Wiles*, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009) ("Unfair prejudice means an undue tendency to suggest decision on an improper basis."); *State v. Johnson*, 293 S.C. 321, 324, 360 S.E. 2d 317,319 (1987) ("[E]vidence of other crimes or prior bad acts is inadmissible to show criminal propensity."); *State v. Gore*, 283 S.C. 118, 121, 322 S.E. 2d 12, 13 (1984) (stating when a "previous alleged bad act is strikingly similar to the one who for which the appellant is being tried, the danger of prejudice is enhanced"); *State v. Taylor*, 399 S.C. 51, 61, 731 S.E.2d 596, 601 (Ct. App. 2011) (recognizing the prejudicial effect of admitting "evidence of other crimes, wrongs, or acts based upon the degree of similarity with the charged crime"). Moreover, based upon the record herein, we are unable to say that the admission of the prior bad act testimony was harmless error. See *Black*, 400 S.C. at 27, 732 S.E.2d at 890 ("In applying the harmless error rule, the court must be able to declare the error had little, if any, likelihood of having ***259** changed the result of the trial and the court must be able to declare such belief beyond a reasonable doubt."); *Scriven*, 339 S.C. at 344, 529 S.E.2d at 77 ("On the basis of this record, we are unable to say that the admission of these prior convictions was harmless error.") Accordingly, we find it appropriate to remand for an on-the-rule record Rule 403 balancing test.

403 S.C. at 258-259, 742 S.E. 2d at 884.

PETITION FOR REHEARING

Appellant petitioned for rehearing and counsel wrote the following:

> The solicitor in this case failed to specify why the Wal-Mart shooting was admissible under Rule 404(b). Instead, she merely made a rote recitation of all the exceptions to State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). Counsel has found in the past when a solicitor can not specify the exception, the real motive is to prejudice the defendant with the prior bad act.
>
> This Court found and concluded that it was "unable to say that the admission of the prior bad act at testimony was harmless error." If the error was not harmless, remanding the case for a Rule 403, SCRE balancing test would lead only to prejudice and confusion, it is respectfully submitted.

Both appellant's petition and respondent's petitions were denied.

THE CURRENT APPEAL

In this current appeal it should be noted that in State v. Palmer and Gorman 413 S.C. 410, 776 S.E. 2d 558 (2015) that the case was also from Horry County and it was also before Judge Hyman. There, the assistant solicitor "admitted that they did not know who did this crime so they were prosecuting both parties!" (Brief of Appellant, p. 21). Directed verdicts were granted on all charges against Palmer by the South Carolina Supreme Court. In this current case, again in Horry County and again before Judge Hyman, the assistant attorney general noted in his Brief of Respondent that "The State proceeded under the theory that either Appellant or Bethea shot the victim…" (Brief of Respondent, p. 8). Apparently, in Horry County, if the solicitors do not, or cannot figure out who is guilty, they will throw their suspects into a trial and let the jury guess at who is guilty.

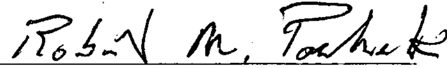
The trial court's order on remand was a blend of "fake law" and "fake facts." The Order stated that there was "over-whelming evidence presented at trial that Defendant was the shooter." (Order, p. 7). That is simply not true. The composite drawing was of Bethea. Appellant was not known to use a .25 caliber semi-automatic handgun. No witnesses identified appellant as the shooter. It was only Bethea himself who dragged appellant into this so Bethea could get his charges reduced.

Next, the trial court stated that "the evidence of the Walmart shooting is overwhelmingly probative." (Order p. 8). Apparently the trial court finds "overwhelmingly probative" synonymous with prejudicial propensity evidence. It forgets the admonition in Gore that "when, as here, the previous alleged bad act is strikingly similar to the one for which appellant is being tried, the danger of prejudice is enhanced." As the court in State v. Alexander said above: "Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper

basis." The danger in this case was that the jury could well conclude that if appellant shot the victim once, he must also be the one who shot him a second time. That is not a fair trial.

CONCLUSION

Appellant should be given a new trial.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of October, 2017.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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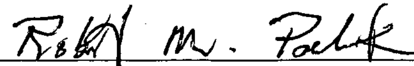
THE STATE, RESPONDENT,

V.

BRIAN KENDRICK SPEARS, APPELLANT

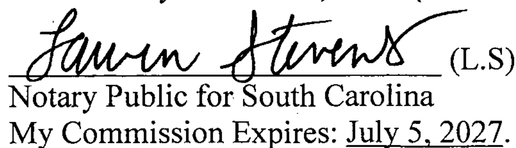
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Brian Kendrick Spears, #340805, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 13th day of October, 2017.



Robert M. Pachak
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me this 13th day of October, 2017.

 (L.S)

Notary Public for South Carolina
My Commission Expires: July 5, 2027.