STATE OF SOUTH CAROLINA

ORIGINAL

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Roger L. Couch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ASHLEY PRICE TINDALL, III

APPELLANT

APPELLATE CASE NO 2017-000808

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On September 12, 2016, the Charleston County Grand Jury returned indictments against Appellant Ashley Tindall for assault and battery of a high and aggravated nature (ABHAN) and possession of a weapon during the commission of a violent crime. R. * (Indictments).

Following the grant of the defense's motion for mistrial on March 20, 2017, Tindall appeared for trial again before the Honorable Roger L. Couch and a jury on March 21-23, 2017. Tindall was represented by Michael Loignon and Martha Runey, and the State was represented by assistant solicitors Alexandra Ginsburg and David Osborne. Trial I Tr. 1-3; Trial I Tr. 131-148; Trial II Tr. 1-2.

The jury convicted Tindall on both counts, finding that the State had met its burden of disproving self-defense. Trial II Tr. 545 – 546. Judge Couch sentenced Tindall to concurrent terms of six years for ABHAN, suspended upon the service of thirty months followed by three years of probation, and five years for the weapons offense. Trial II Tr. 558 – 559; R. * (Sentencing Sheets).

This appeal follows.

STATEMENT OF FACTS

The charges against Appellant Tindall related to an alleged assault against neighbor Richard "Rick" Hilding. Hilding had introduced himself to Tindall when he first moved into the area, but the two men had little interaction with each other beyond that until the night of July 4, 2014. Trial II Tr. 225, ll. 5-20; Trial II Tr. 442, ll. 20 – 443, l. 6. Tindall admitted that he struck Hilding in the head with a trimming hammer, which resulted in a four centimeter cut that required four staples to the top of Hilding's head. Trial II Tr. 230, ll. 6-8; Trial II Tr. 254, ll. 7 – 256, l. 8; Trial II Tr. 329, ll. 20-25; Trial II Tr. 433, ll. 1-7; Trial II Tr. 445, ll. 7-16. However, Tindall presented evidence that he acted in self-defense.

Earlier in the evening, Tindall was expecting his wife, Sara Tindall (hereinafter "Sara"), to return home from neighbors Teresa and Bob Escoffier's pig roast at eight o'clock. Tindall did not want to go to the party because he knew there would be alcohol and he had been sober for twenty-five years. At approximately 8:30 p.m., he went next door to look for Sara and found her playing a game of pool. Tindall returned home, but when Sara was still not home twenty minutes later, he went back to the party and asked to speak with her. Trial II Tr. 415, l. 15 – 422, l. 2; see also Trial II Tr. 164, l. 2 – 166, l. 23. He raised his voice and said "that's bull shit" when Sara gave him the excuse he had heard in the past, that time got away from her. Teresa Escoffier, Sara's best friend, called for her husband, Bob. Tindall thought Bob was going to hit him and stuck a "stiff hand" out, knocking Bob in the chin. Bob tripped over his dog and fell to the ground. Intimidated by the group of partygoers coming toward him and seeking a means to get away, Tindall said "Y'all want something? Okay. I got something for you. I'll be right back." Tindall then returned to his trailer and got the keys to his truck. Trial II Tr. 87, ll. 18-22;

Trial II Tr. 94, ll. 2-9; Trial II Tr. 167, ll. 2-25; Trial II Tr. 438, ll. 7-17; Trial II Tr. 422, l. 3 – 425, l. 15.

Tindall was backing out of his driveway, heading to get dinner, when he saw Sara coming around the front of their trailer toward the passenger side of his truck. Tindall rolled down the windows and Sara asked him where he was going. In the midst of their "heated discussion," Tindall noticed Hilding approaching the driver's side of the truck. Trial II Tr. 167, l. 20 – 168, l. 18; Trial II Tr. 428, l. 17 – 430, l. 7; Trial II Tr. 441, ll. 2-16. Thinking that Hilding was going to punch him, Tindall got out of his truck to face him. He described Hilding as belligerent and drunk. Hilding told Tindall: "Hey, we're having a good time over here, you need to stop, we're not going to have no fights." Trial II Tr. 430, ll. 8-20; Trial II Tr. 441, l. 17 – 442, l. 11. Tindall responded: "Look, this doesn't concern you, this is me and my wife, you need to go back to where you came from." Trial II Tr. 168, l. 19 – 170, l. 7; Trial II Tr. 430, ll. 20-22. Tindall put his arm out to prevent Hilding from getting close enough to land a punch. Hilding fell down three times, but continued to get back up and advance toward Tindall. Hilding then grabbed Sara and wrapped his arms around her, trying to drag her away from the area. Tindall asked: "Do you realize you've got your arms wrapped around my wife?" and separated the two. Trial II Tr. 170, l. 8 – 174, l. 4; Trial II Tr. 430, l. 23 – 431, l. 25; Trial II Tr. 443, ll. 11-18.

Hilding told Tindall that if he hit him again, he would "fucking kill [him]" and grabbed Tindall around the upper torso. Trial II Tr. 174, l. 5 – 175, l. 9; Trial II Tr. 432, ll. 3-25. Tindall reached into the back of his truck, got a small trimming hammer, and struck Hilding in the head with the wooden handle of it. Hilding fell to the ground and Tindall heard people rushing their direction, so he got in his truck and drove away. Trial II Tr. 433, ll. 1-13; Trial Tr. 445, l. 4 – 447, l. 1. Tindall could see that Hilding was still on the ground in the rearview mirror. He was

never under Tindall's truck tires, as the entire altercation occurred next to the truck. Trial II Tr. 433, l. 14 – 434, l. 7.

Tindall returned home later that evening and was arrested by police. He admitted that he hid when the police knocked on the door. Tindall explained that while he anticipated that the police would come because of the incident in the Escoffier's yard, he was not prepared to go to jail. He did not think he would be arrested for the incident that occurred in his own yard with Hilding. Trial II Tr. 434, ll. 8-25; Trial II. Tr. 447, ll. 11-25.

Sara gave a similar account of the altercation between Tindall and Hilding. She saw Hilding approaching Tindall's truck and told Tindall to "please go." Instead, Tindall got out of his truck and they exchanged words. After several attempts to charge Tindall, Hilding put his arms around Sarah and pulled her in toward him. Tindall untangled Sara and pushed the two apart, after which Hilding threatened Tindall and charged toward him. Trial II Tr. 149, l. 7 – 155, l. 15; Trial II Tr. 169, l. 17 – 175, l. 2. She saw Hilding fall to the ground and hold his head. She later heard varying reports from the neighbors about what Tindall used to hit Hilding, including a bat, a gun, and nunchucks. Sara did not see the implement used herself, but she knew that it was not a gun because Tindall did not own a handgun and a bat would have been large enough for her to see. The men who had been back by the oak tree started to approach them, so she told Tindall that he better go. She confirmed that Hilding was not near, much less under, the truck when Tindall pulled away. Trial II Tr. 155, l. 16 – 158, l. 2; Trial II Tr. 175, ll. 2-9; Trial II Tr. 177, l. 19 – 179, l. 19.

On the ride to the police station on the night of July 4, 2014, Deputy Jeffrey Phillips responded to Tindall's question about what Hilding said occurred. Tindall told deputy Phillips: "I am a fat old man. I don't use nunchucks. I used my fists to beat him with." Trial II Tr. 326, l.

1 – 327, l. 8. On July 6, 2014, deputy Phillips went back to Tindall's home in response to a telephone call from Tindall. Tindall provided a written statement, in which he admitted that he used a trimming hammer. Trial II Tr. 327, ll. 9-18; Trial II Tr. 329, l. 20 – 330, l. 5.

Other witnesses gave varied accounts of the events of the evening and the incident between Tindall and Hilding. Hilding was at the Escoffier's house during the disturbance involving Tindall. He claimed that he went through the easement to go home to check on his dog and saw Tindall and Sara arguing on the side of the road. Hilding told Tindall to calm down and that 911 had been called. Hilding said that as he was approaching the truck, he saw a hand go up and flash of light, then woke up in the Escoffier's backyard. He denied being drunk and said that he never touched Tindall or Sara. Trial II Tr. 219, l. 5 – 229, l. 7; Trial II Tr. 237, l. 13 – 240, l. 18. However, Hilding reported consuming a six-pack of beer to the paramedics who responded to the scene and the treating physician in the emergency room recalled that Hilding smelled of alcohol. Trial II Tr. 256, l. 23 – 257, l. 1; Trial II Tr. 262, ll. 1-8; Trial II Tr. 381, ll. 6-18.

The other witnesses who purportedly had some view of the incident between Tindall and Hilding included Dennis Bell, Chris Hilding, and Daniel Moore. Dennis Bell[1] was visiting his sister, who lived across from Tindall, on the night of the incident. He recalled sitting on the tailgate of his truck in her driveway when he heard a man and women, presumably Tindall and Sara, arguing. Trial II Tr. 386, l. 23 – 387, l. 18; Trial II Tr. 388, l. 20 – 389, l. 10. Bell went halfway up the driveway to get a better look and saw a group of people from the party next door approaching Tindall and start arguing with him. Bell was afraid there "might be trouble for"

[1] Bell attended school with Tindall but had not seen him in over thirty years. He did not recognize Tindall on the night of the incident. Trial II Tr. 386, ll. 11-22; Trial II Tr. 389, l. 24 – 390, l. 1.

Tindall when "everybody [came] up on him." A couple of minutes later Bell heard "a couple pops," which could have been firecrackers, and then saw a man who was bleeding walk away with the help of a couple of people. Then the police and ambulance arrived. Trial II Tr. 389, l. 11 – 391, l. 21; Trial II Tr. 399, ll. 18-25. Bell did not actually see Tindall hit Hilding or what precipitated the hit. Trial II Tr. 397, l. 3 – 399, l. 13; Trial Tr. II 400, l. 14 – 401, l. 1.

Hilding's son, Chris, followed the men who were running over to the Tindall's property. Though he could not hear what Hilding or Tindall said, Chris claimed that his father was trying to calm things down when Tindall struck him. Trial II Tr. 196, l. 5 – 204, l. 5; Trial II Tr. 207, ll. 2-13; Trial II Tr. 210, l. 2 – 213, l. 1. Chris could not see what was used to strike Hilding. Trial II Tr. 202, ll. 18-20; Trial II Tr. 213, ll. 2-5.

Daniel Moore was one of the men who went toward to the Tindall property with Hilding. He recalled Hilding saying to the other men at the party, "what are we, mice or men?" and admitted that the men went to Tindall's house to insure that Tindall did not come back. Trial II Tr. 291, l. 23 – 293, l. 24; Trial II Tr. 304, l. 11 – 305, l. 2. Hilding conveniently did not recall such a comment, which would have been inconsistent with his claim that he headed in the direction of Tindall's house because he was on his way to his own home to check on his dog. See Trial II Tr. 238, ll. 12-16; Trial II Tr. 222, ll. 7-17; Trial II Tr. 223, ll. 2-6. Moore heard Tindall and Sara arguing and then saw Tindall's truck begin backing up. According to Moore, Tindall had a pistol drawn when got out of the truck. He warned Rick "he has a gun" but Hilding approached Tindall anyway. Moore claimed that Tindall pushed Hilding's arm, which led Hilding to grab Tindall's arm. Tindall then hit Hilding in the head with what Moore believed was the butt of a gun and the two began "tussling." Trial II Tr. 294, l. 8 – 297, l. 2; Trial II Tr. 306, ll. 4-15. Moore went to break up the fight, at which time Tindall allegedly pointed the gun

at Moore before getting into his truck and driving away. Trial II Tr. 297, l. 3 – 298, l. 16. Moore admitted that the only mention of a gun in his written statement referred to the blow to Hilding, with no mention of a gun being pointed at him. Trial II Tr. 307, l. 4 – 308, l. 4. Moore did not recall Tindall ever pulling the trigger on the gun. Trial II Tr. 308, ll. 2-9.

Moore's sister, Dana Bradwell, was not present during the actual confrontation between Tindall and Hilding. Bradwell maintained that she could hear the supposedly distinctive sound of metal hitting bone from the Escoffier's front yard, causing her to run over to Tindall's property. Trial II Tr. 274, l. 18 – 276, l. 2. She claimed that she arrived to see Rick on the ground and Tindall putting a gun in her brother's face. She further averred that Tindall pulled the trigger twice but the gun failed to fire. Notably, Bradwell did not provide any of this information to the prosecution until a few months prior to trial. Trial II Tr. 276, l. 3 – 279, l. 10; Trial II Tr. 283, l. 13 – 284, l. 21. Deputy Phillips did not recover any gun and concluded that the witnesses were uncertain about the type of weapon that was used to strike Hilding. Only one of them, Moore, had provided a statement claiming that he saw Tindall with a handgun. Trial II Tr. 347, l. 24 – 349, l. 23.

The indictment for possession of weapon during the commission of a violent crime specified that Tindall "did possess a firearm or did visibly display what appeared to be a firearm or did visibly display a knife." R.* (weapons indictment); see S.C. Code Ann. § 16-23-490. The jury received an additional instruction on this in response to their request for clarification on whether the offense was "limited to a knife or gun only." Trial II Tr. 540, l. 24 – 543, l. 18.

ARGUMENT

I.

The trial court erred in admitting the 911 call placed by Teresa Escoffier where it contained inadmissible hearsay, contained inadmissible character evidence, and any probative value was substantially outweighed by the danger of unfair prejudice and confusion of the issues.

Relevant Facts

Teresa Escoffier (hereinafter "Teresa") placed a 911 call on the night of the incident, a partially redacted copy of which was admitted into evidence. State's Ex. 7 (911 call, on file with this Court). The defense's objection to the admission of the 911 call was not rooted in the Confrontation Clause, but rather that the content of the call violated the rules against hearsay, improper character evidence, and evidence that is unfairly prejudicial and confuses the issues. See Rules 403, 404, and 802, SCRE. The trial judge erred in ruling that the call was admissible under the following hearsay exceptions: present sense impression, excited utterance, then existing mental state or physical condition, and regularly kept record of government or business. Rule 803, SCRE. He also erred in ruling that the probative value outweighed the danger of unfair prejudice or confusion. Rule 403, SCRE.

The prosecution made a pre-trial motion *in limine* to admit evidence of the first incident between Tindall and Bob Escoffier and the 911 call, arguing the re gestae theory. Trial I Tr. 49, l. 5 – 52, l. 16; Trial I Tr. 54, l. 7 – 55, l. 16; Trial I Tr. 58, ll. 4-23. Defense counsel conceded that some evidence regarding the prior incident, for which Tindall was not on trial, was proper to provide context to the incident involving Hilding. However, he argued that the prosecution should be limited in the amount of detail they were allowed to elicit. He argued that the entire 911 call should be excluded because it was not necessary to *res gestae* and its probative value

was outweighed by its prejudicial effect. He noted that the 911 call was placed by someone who did not see the second incident as it occurred. Rather, Teresa was relaying information she received from other individuals. Trial I Tr. 52, l. 22 – 53, l. 25; Trial I Tr. 55, l. 18 – 58, l. 1. The trial judge ruled:

> All right. And as the evidence has been described to me, if presented that way at trial, it would be my finding that the *res gestae* exception would apply in this case. Because of the continuous nature of the event, it appears the closeness in space -- they were all in the same area, neighborhood, I'd say, and then on the street in front of the houses -- I do find that it also would serve to identify the Defendant because he was involved in an argument with his wife on the premises and on the street. And it happened so quickly, I mean, from what [has] been described to me.
>
> So, if that's the way the evidence bears out, then I'm not going to exclude it. I'll allow it.
>
> . . .
>
> I do find that the probative value you get with those factors would outweigh the prejudicial effect.

Trial I Tr. 58, l. 24 – 59, l. 16.

Following a mistrial the day prior, when the new trial began on March 21, 2017, the trial judge said that his earlier pre-trial rulings would stand. Trial II Tr. 45, l. 10-13. Because the State's publication of an improperly redacted 911 call to the jury necessitated the prior mistrial, the prosecutor placed on the record that the parties had agreed to certain redactions to the recording but that the defense was not stipulating to admission of the call. Defense counsel confirmed that he would renew his objections to the admission of the call when it was offered. Trial II Tr. 64, l. 12 – 65, l. 11. Even with the partial redactions, the recording still included statements regarding the prior incident between Tindall and Bob Escoffier, alleging that Tindall assaulted her husband by punching him and grabbed and threatened Teresa's pregnant daughter. Teresa also made several statements regarding Sara Tindall, including: "Sara can't go back home. He's going to beat the shit out of her"; "He might kill his wife right now"; "Oh my God

he's gonna kill his wife"; "He hit Sara, he did hit his wife"; "They said his wife was hit. I don't know what kind of shape she is in."; and "I can't believe he hit Sara." Teresa is also heard asking an unknown person "Sara needs medical attention too?" Throughout the call Teresa repeatedly said, referring to Tindall: "He's gonna kill somebody"; "He's flipped out"; and "He has lost it." Though she did not observe the incident in the Tindall's yard, Teresa reported: "Oh my God, now he beat up my neighbor";"He's knocking the shit out of old people."; and "He already the neighbor in the face with his gun." She is also overheard telling an unknown person that the operator wants her to talk to "the guy who was pistol whipped" and saying "I can't believe he hit you with a gun." Though Teresa eventually admitted to the operator that she had not seen any gun herself, she repeatedly told the operator "he has a gun" and said "he has all kinds of guns; he's crazy." State's Ex. 7 (911 call, on file with this Court).

When the prosecutor moved to admit the redacted recording of the 911 call during the testimony of Teresa Escoffier, the defense argued that the entire 911 call should be excluded because its contents included hearsay, improper character evidence, prejudicial and confusing. Defense counsel further renewed his argument from the day prior that the call was not necessary under the *res gestae* theory. Trial II Tr. 110, l. 18 – 112, l. 24. He also argued that any description of events taking place outside of the speaker's presence on Still Life Drive were inadmissible hearsay and that references to Tindall's owning lots of guns and being crazy were inadmissible character evidence. Trial II Tr. 112, l. 25 – 113, l. 9.

The prosecution argued that the placement of the 911 call was why Hilding approached Tindall, countered the defense's theory that the neighbors were conspiring against him, and provided evidence of the weapons offense. Trial II Tr. 113, ll. 11-22. Regarding hearsay, she argued that its contents were admissible as "excited utterance, present sense impression and

business record." Trial II Tr. 114, ll. 8-12. Defense counsel reiterated his argument that the witness was relaying an account of events that she admittedly did not perceive herself. Trial II Tr. 114, ll. 14-18; Trial II Tr. 115, l. 19 – 116, l. 10. The trial judge agreed with the prosecution's responsive argument that the rule did not require the speaker to have perceived the event. Trial II Tr. 116, l. 11 – 117, l. 7. Thus, he ruled that the 911 call was admissible "under... those three hearsay exceptions, and as a regularly kept record." Trial II Tr. 117, ll. 7-10. He further ruled that the probative value outweighed any prejudice, finding that the call evidenced the speaker's concern and "identifies who was involved and where they were, and the risk they posed." Trial II Tr. 117, 13-22.

Discussion

A. No Applicable Hearsay Exception

Hearsay is defined as an out-of-court statement offered for the truth of the matter asserted. Rule 801(c), SCRE. The Rules of Evidence provide that "[h]earsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute." Rule 802, SCRE.

1. The Present Sense Impression Exception Requires That the Declarant "Personally Perceived" the Event.

The trial court erred in finding that the present sense impression exception to the rule against hearsay was applicable. Rule 803(1), SCRE, defines a "present sense impression" as "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." "There are three elements to the foundation for the admission of a hearsay statement as a present sense impression: (1) the statement must describe or explain an event or condition; (2) the statement must be contemporaneous with the event; and (3) the declarant must have personally perceived the

event." State v. Hendricks, 408 S.C. 525, 533, 759 S.E.2d 434, 438 (Ct. App. 2014). Defense counsel was correct in arguing that Teresa's statements about events that she did not personally observe were not admissible under the present sense impression exception to the rule against hearsay. Contrary to the prosecution's argument and the trial judge's ruling, it is the declarant of the statement being offered who must have perceived the event they were describing or explaining. See Trial II Tr. 116, l. 11 – 117, l. 7.

2. The Excited Utterance Exception Requires that the Declarant "Witnessed" the Event.

The trial court erred in finding that the excited utterance exception to the rule against hearsay was applicable. 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" and may be admitted at trial as an exception to the hearsay rule. Rule 803(2), SCRE. The rationale underlying the excited utterance exception is that "the startling event suspends the declarant's process of reflective thought, reducing the likelihood of fabrication." State v. Dennis, 337 S.C. 275, 284, 523 S.E.2d 173, 177 (1999). The burden of establishing the facts which qualify a statement as an excited utterance rests on the party seeking its admission. State v. Davis, 371 S.C. 170, 178, 638 S.E.2d 57, 62 (2006). "[S]tatements which are not based on firsthand information, such as where the declarant was not an actual witness to the event, are not admissible under the excited utterance exception to the hearsay rule." Id. (citing State v. Hill, 331 S.C. 94, 99, 501 S.E.2d 122, 125 (1998)). In other words, like the present sense impression exception, the declarant must have actually perceived the event about which they are speaking in order for it to constitute an excited utterance. Thus, Teresa's statements about events that she did not personally observe were not admissible under the excited utterance exception.

3. The Then Existing Mental, Emotional, or Physical Condition Exception Is Limited to the Declarant's State of Mind and Does Not Permit Admission of "The Reason for the Declarant's State of Mind"

The trial court erred in finding that the then existing mental, emotional or physical condition exception to the rule against hearsay was applicable. Rule 803(3), SCRE, permits the admission of "[a] statement of **the declarant's** then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), **but not including a statement of memory or belief to prove the fact remembered or believed** unless it relates to the execution, revocation, identification, or terms of declarant's will." (emphasis added). "These statements are considered trustworthy because they are based on unique perception; that is, the declarant has a unique perspective into his own feelings and emotions. State v. Garcia, 334 S.C. 71, 75, 512 S.E.2d 507, 509 (1999) (internal quotations omitted). Rule 803(3), SCRE, does not permit a statement of memory or belief to prove the fact remembered, unless relating to the declarant's will. Id. at 76, 512 S.E.2d at 509. "The purpose of this exclusion is to avoid the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as a basis for an inference of the happening of the event which produced the state of mind." Id. (internal quotations omitted). "Consequently, while the present state of the declarant's mind is admissible as an exception to hearsay, the reason for the declarant's state of mind is not." Id. Thus, while Teresa's statement "I'm just so scared" would likely fall within the exception, the reason that she was scared would not be admissible. Additionally, Teresa's statements about what she speculated that Tindall might do not fit within this exception because they do not relate to Teresa's state of mind.

4. The Business Records Exception Does Not Permit Admission of the Subjective Opinions and Judgments Found Within the Record

The trial court erred in finding that the business records exception to the rule against hearsay was applicable. Rule 803(6), SCRE, provides:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, **unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness; provided, however, that subjective opinions and judgments found in business records are not admissible.** The term "business" as used in this subsection includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(emphasis added). The recording of 911 call transmissions are undoubtedly kept in the course of a regularly conducted business activity and the custodian of records testified prior to Teresa. Trial II Tr. 97 – 101. However, the rule itself specifies that "subjective opinions and judgments found in business records are not admissible." Rule 803(6), SCRE; Duncan v. Ford Motor Co., 385 S.C. 119, 137, 682 S.E.2d 877, 886 (Ct. App. 2009). The 911 call was replete with subjective opinions and speculation rather than objective facts, and it lacked the trustworthiness that serves as the basis for the admission of such records. Thus, this exception was wholly inapplicable.

B. Improper Character Evidence

Defense counsel argued that references to Tindall's character, including that he owned lots of guns and was being crazy, were inadmissible character evidence. Trial II Tr. 112, l. 25 – 113, l. 9. Rule 404(a)(1), SCRE, prohibits evidence of a person's character or a trait of character is for the purpose of proving action in conformity therewith on a particular occasion. An

exception to this rule exists for "[e]vidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same." Rule 404(a)(1), SCRE. "The term 'character' refers to a generalized description of a person's disposition or a general trait such as honesty, temperance or peacefulness." State v. Nelson, 331 S.C. 1, 7, 501 S.E.2d 716, 719 (1998). "Generally speaking, character refers to an aspect of an individual's personality which is usually described in evidentiary law as a 'propensity.'" Id. (citations omitted). Here, the admission of the description of Tindall as owning lots of guns and being crazy was aimed at showing that Tindall has a propensity to use weapons and act irrationally.

C. Danger of Unfair Prejudice and Confusion

Defense counsel argued that the any otherwise admissible portions of the 911 call should be excluded because the probative value of its content was outweighed by the danger of unfair prejudice and confusion of the issues. Rule 403, SCRE, provides: "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 considerations of undue delay, waste of time, or needless presentation of cumulative evidence." With respect to probative value, the trial court found that the call evidenced the speaker's concern and "identifies who was involved and where they were, and the risk they posed." Trial II Tr. 117, 13-22. While Teresa did identify the individual who she was describing as Ashley Tindall, her best friend's husband, who wore a gray t-shirt and jeans, identity was not an issue in this case. Tindall readily admitted that he was the individual involved in the incident with Bob Escoffier and with Hilding. Teresa's "concerns" were largely speculative, as much of them were based upon information she learned from others rather than any personal observation.

Regarding information about the initial uncharged incident, there was a real danger of confusing the issues for the jury. Their task was to determine whether the State proved beyond a reasonable doubt that Tindall assaulted Hilding and whether he used a firearm or what appeared to be a firearm in its commission. The State argued that Teresa's statements about the first incident were admissible under the *res gestae* theory. "The *res gestae* theory recognizes evidence of other bad acts may be an integral part of the crime with which the defendant is charged, or may be needed to aid the fact finder in understanding the context in which the crime occurred." State v. King, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999). "The evidence admitted must logically relate to the crime with which the defendant has been charged." State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009). "[E]vidence considered for admission under the *res gestae* theory must satisfy the requirements of Rule 403 of the South Carolina Rules of Evidence." State v. Dennis, 402 S.C. 627, 636, 742 S.E.2d 21, 26 (Ct. App. 2013). Here, while defense counsel conceded that some evidence of the prior incident was relevant to place the incident with Hilding in context, the admission of the 911 call was unnecessary and provided a far more emotional presentation than the testimony elicited from the prosecution's witnesses. Thus, the trial judge erred in finding that the probative value outweighed the danger of unfair prejudice and confusion.

II.

The trial court erred in ruling that the defense presented evidence of Petitioner's character so as to "open the door" to an attack on Petitioner's character during the prosecution's cross-examination of him.

Relevant Facts

Just prior to the presentation of the defense's case, the prosecution argued that the defense "set the stage" for the admission of character evidence in his opening statement and that by the questions he asked of Sara Tindall during his cross-examination "he not only opened a door, he ran right through it." Trial II Tr. 357, l. 13 – 358, l. 2. The following exchange occurred during the defense's cross-examination of Sara:

COUNSEL: Tell me a little bit about your everyday routine when you get up I in the morning.

S. TINDALL: When I get up in the morning?

COUNSEL: Yes.

S. TINDALL: I get up, get dressed, get ready for work, go to work.

COUNSEL: And around what time is that?

S. TINDALL: I have to be to work at seven in the morning, so I get up about 5:45 to get ready.

COUNSEL: You up by yourself?

S. TINDALL: No. My husband gets up with me.

COUNSEL: Wh[at] does he do?

S. TINDALL: He just gets up, watches a little bit of the news, waits for me to leave and walks me to the door.

COUNSEL: He walks you to the door?

S. TINDALL: Yeah, every morning.

COUNSEL: Sees you off to work?

S. TINDALL: Yes, sir.

COUNSEL: What time do you get home normally in the afternoon from work?

S. TINDALL: Usually about three, 3:30.

COUNSEL: And that's the time you got home on this day, right?

S. TINDALL: Yes, sir.

Trial II Tr. 163, l. 6 – 164, l. 4.

COUNSEL: So, let's jump back to just a typical day. Removing ourselves from the 4th of July for just a moment. You generally eat dinner together as a family?

S. TINDALL: Yes, sir.

COUNSEL: And do you generally prepare dinner as a family?

S. TINDALL: Yes, sir. We usually either cook together, or he'll cook.

COUNSEL: And do you sit down and eat together as a family?

S. TINDALL: Yes, sir.

COUNSEL: So, that's something that's a normal part of your day?

S. TINDALL: Yes, sir.

Trial II Tr. 164, l. 25 – 165, l. 14.

The prosecution argued that the testimony was "nothing more than character evidence to show that he is a good father and a good husband." Trial II Tr. 358, ll. 3-12; Trial II Tr. 360, ll. 19-25. Thus, he argued that if Tindall testified, the prosecution should be able to ask Tindall if has every hit Sara before. Trial II Tr. 358, ll. 12-16. The prosecution clarified that there was no prior conviction for domestic violence and that it was only seeking to cross-examine Tindall on the character trait. Trial II Tr. 358, l. 17 – 359, l. 7. Defense counsel responded that he did not

offer evidence of any specific trait and that the testimony was offered to rebut to the State's portrayal of Tindall as controlling, imposing a "curfew" on his wife, and upset that his dinner was not prepared on time. Trial II Tr. 359, ll. 11 – 360, l. 18; Trial II Tr. 361, l. 1 – 362, l. 2. The trial judge ruled: "Okay. I'll probably allow you to cross-examine him about that issue. It seems to me that the door has been opened." Trial II Tr. 362, ll. 3-5.

In its cross-examination Sara's brother, John Sager, who resided with Sara and Tindall but was a severe alcoholic, the prosecution asked: "So, potentially Mr. Tindall could have been beating up your sister and you'd have no idea." Trial II Tr. 406, ll. 15-16. Sager responded: "Would not know." Trial II Tr. 406, l. 17. On cross-examination of Tindall, he denied that he had ever hit Sara before. Trial II Tr. 438, ll. 24-25.

Discussion

When the accused offers evidence as to a pertinent trait of his character, the State may cross-examine as to particular bad acts or conduct relating to the traits focused on by the accused. State v. Major, 301 S.C. 181, 391 S.E.2d 235 (1990); Rule 404(a)(1), SCRE. The prevailing view is that only pertinent traits – those involved in the offense charged – are provable. State v. Mizell, 332 S.C. 273, 278, 504 S.E.2d 338, 341 (Ct. App. 1998). Though State v. Haselden, 353 S.C. 190, 577 S.E.2d 445 (2003), involved the defendant's objection to what it argued was improper character evidence, it is instructive in the present case. In Haselden, the State elicited testimony from the defendant's ex-wife that when Haselden was not working "he was fishing or golfing with his friends or at his mothers" and spent little time with her or their son, who Haselden was accused of beating to death. 353 S.C. at 193-95, 577 S.E.2d at 447-48. Haselden argued that the testimony concerning his golfing and fishing habits constituted an improper attack on his character. Id. at 196, 577 S.E.2d at 448. This Court disagreed, finding that "[e]vidence Haselden had a tendency to golf, fish, or go to his mother's

house is simply not evidence which would tend to prove he had a tendency toward abusing and murdering his two-year old son." Id.

Here, defense counsel was correct in his assertion that the evidence he presented was not character evidence because the quality of Tindall's marital relationship was not a trait involved in the offense charged. If anything it was the prosecution that opened the door to the examination of Sara, which was aimed at rebutting the prosecutor's theme that Tindal was controlling and set a curfew for his wife to ensure that she was home to make his dinner. See Trial II Tr. 69, l. 23 – 70, l. 19; Trial II Tr. 74, ll. 18-19; Trial II Tr. 142, ll. 8-23; Trial II Tr. 464, ll. 6-10. The defense's reasonable and calculated response to that theme did not inject Tindall's character as a matter for rebuttal as provided in Rule 404(a)(1), SCRE. The trial judge erred in ruling that the defense opened the door to cross-examination on Tindall's character.

III.

The trial court erred in granting the prosecution's request to treat Sara Tindall, Appellant's wife, as a hostile witness when the State called her as a witness in their case in chief.

Relevant Facts

The prosecution called Sara Tindall to testify against her husband in their case in chief. After eliciting some information regarding Sara's background, the prosecutor asked Sara about her prior refusal to speak with the prosecution's investigator. When their investigator came to Waffle House, where she worked, she told him that she should not talk to him. She also acknowledged that he offered to set up a time for Sara to come to the solicitor's office. Trial II Tr. 132, l. 12 – 135, l. 25. When defense counsel objected to the use of leading questions on direct examination, the trial judge initially sustained the objection. Trial II Tr. 136, ll. 1-2. The prosecutor then requested permission to lead under Rule 611(c), SCRE, arguing "she's been identified to a hostile or an adverse party witness." Trial II Tr. 136, ll. 3-5. Over defense counsel's objection, the trial judge ruled:

> Well, it has to do with her position in the case and whether or not she's apparently not been willing to talk to them up to this point in time. So I'll make that designation.
>
> That'll allow this attorney to ask what is called leading questions, when a witness has been declared to be hostile.
>
> I made that designation. You may proceed.

Trial II Tr. 136, ll. 6-21. The leading questioning continued, during which Sara denied receiving any voicemail messages from the prosecution but agreed that she had spoken with Tindall's defense attorney. Trial II Tr. 136, l. 23 – 137, l. 9. At the conclusion of her testimony, the trial judge provided the following additional explanation regarding his ruling:

> I do want to put one thing on the record regarding the last witness, Mrs. Tindall. She was offered by the defense after they began to examine her as a hostile witness. I did not require them at that time to make a proffer to indicate that she was -- her testimony was either a surprise or would indicate actual harm.
>
> But after having heard her testimony, her testimony was that she had refused to talk to the State between the time of the giving of her statements and the time of her testimony. Her testimony was at odds with and varied from her statements. So my finding would have been that there would be surprise and actual harm.
>
> It doesn't affect the ruling, and my ruling would have been the same had I taken a proffer at that time.
>
> So, I just wanted to put that on the record that I see the result would have been the same.

Trial II Tr. 186, l. 10 – 187, l. 2.

Discussion

Rule 611(c) provides: "When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions." A showing of both actual surprise and harm is required to establish "hostility," with the final determination being left to the discretion of the trial judge. State v. Bissette, 279 S.C. 98, 302 S.E.2d 344 (1983). A party seeking to have a witness declared hostile on the ground of surprise must be either surprised by the testimony or deceived or entrapped by the contradictory statements into introducing the witness. State v. Ellefson, 266 S.C. 494, 497, 224 S.E.2d 666, 668 (1976). If the contradictory statements are otherwise incompetent, surprise cannot be feigned in order to get the statements to the jury. Id. A showing of actual surprise may not be possible where counsel seeks to have a witness declared hostile before the witness testifies. State v. Hawkins, 310 S.C. 50, 425 S.E.2d 50 (Ct. App. 1992).

Where the State knows a witness will testify inconsistently with previous statements he or she has given and decides to call the witness anyway, the State was not surprised by the

witness's inconsistent testimony. State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989). With the adoption of Rule 607, SCRE, the State would be allowed to impeach the witness despite the lack of surprise, but it would not be allowed to otherwise use leading questions under Rule 611(c), SCRE.

Here, the prosecution had both written statements provided by Sara, the latter of which Sara testified was truthful. Her prior statement was given while she was intoxicated and included information she heard from other neighbors rather than what she saw herself. Trial II Tr. 141, l. 2 – 162, l. 24. In light of the inconsistencies between the statements, it was inevitable that Sara would adopt one statement or the other, or deny both. In this case, where she adopted the latter statement, the prosecution did not have a valid claim of surprise or harm. The trial judge's decision to allow the solicitor to lead the witness was an abuse of discretion.

CONCLUSION

Based on the foregoing, Appellant Ashley Tindall respectfully requests that this Court reverse his convictions and sentences and remand his case for a new trial.

Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT

This 1st day of February, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Roger L. Couch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ASHLEY PRICE TINDALL, III

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 J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and upon Ashley Price Tindall, III, at Wateree River Correctional Institution, PO Box 189, Rembert, SC 29128-0189, this 1st day of February, 2018.

Laura R. Baer
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 1st day of February, 2018.

(L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027 .