STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Orangeburg County

Honorable Edgar W. Dickson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOHNATHAN GREEN,

APPELLANT

APPELLATE CASE NO 2016-002256

FINAL BRIEF OF APPELLANT

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2. Did the trial judge err in allowing the witness to testify that on a prior occasion Appellant threatened to blow the witness's face off when the testimony was not relevant, did not meet an exception pursuant to Rule 404(b), the State failed to prove the alleged prior threat by clear and convincing evidence and the probative value of the alleged prior threat is substantially outweighed by the danger of unfair prejudice pursuant to Rule 404(b), SCRE?

3. Did the trial judge err in refusing to redact portions of a 911 call where the witness references an alleged prior threat by Appellant and tells the operator that Appellant is usually armed when the probative value of that portion of the tape is substantially outweighed by the danger of unfair prejudice pursuant to Rule 403, SCRE?

STATEMENT OF THE CASE

In April of 2016, the Orangeburg County Grand Jury indicted Appellant Green for several counts of attempted murder. In August of 2016, the Orangeburg County Grand Jury indicted Appellant for one count of discharging a firearm into a dwelling, indictment #2016-GS-38-1244. (R. p. 476). On October 25, 2016, Appellant proceeded to jury trial before the Honorable Edgar W. Dickson on two counts of attempted murder, indictments #2016-GS-38-223, 224 and the one count of discharging a firearm into a dwelling. (R. p. 494-497). Byron E. Gipson represented Appellant at trial. Tommy Scott and Josh Edwards prosecuted the case. The jury returned verdicts of guilty and Judge Dickson sentenced Appellant to two thirty (30) year concurrent sentences for attempted murder and ten (10) years concurrent for discharging a firearm into a dwelling. A timely notice of intent to appeal was served on November 4, 2016. This appeal follows.

ARGUMENTS

1. **The trial judge erred in allowing the witness to testify that on a prior occasion Appellant assaulted her when the testimony was not relevant, did not meet an exception pursuant to Rule 404(b), the State failed to prove the alleged prior assault by clear and convincing evidence and the probative value of the alleged prior assault was substantially outweighed by the danger of unfair prejudice pursuant to Rule 404(b), SCRE.**

The jury found Appellant guilty of shooting at the mother of his child, Elise Hogges, and her boyfriend and later husband, Kenduan Minus, on December 13, 2015. Prior to trial Appellant moved to suppress testimony about three prior acts allegedly committed by Appellant against Hogges-Minus. During the pre-trial hearing Hogges-Minus testified about an alleged incident almost a year earlier in January of 2015, an alleged incident when Appellant allegedly pulled a gun on her in front of their daughter and an alleged incident at Thanksgiving. During the pre-trial hearing Hogges-Minus testified that during the alleged incident in January of 2015, Appellant "... pulled my hair, snatched my hair out and pulled it from scalp." (R. p. 13, lines 19-23). She also testified that, "He bust my tire and threw my keys in the woods." (R. p. 14, line 4). Hogges-Minus admitted that she did not call the police but testified that she went to the sheriff's department and filed a report. (R. p. 15, lines 15-22). The officer who took the report noted that he did not observe any physical injury. (R. p. 26, lines 1-5). The sheriff's department did not press charges against Appellant for the alleged January incident. (R. p. 26, lines 8-18).

The judge properly suppressed any testimony in regard to the alleged incident of pulling a gun in front of the daughter. (R. p. 30, lines 3-13). In ruling the trial judge addressed the alleged Thanksgiving incident, finding that the incident went to motive which is addressed in issue two below, and then stated, "It kind of goes along with the January event that shows the animus between them. And there are a couple of cases where there's domestic violence you can use that

testimony later on, a prior domestic violence even in an assault and battery with intent to kill. And so I've got some cites here if you are interested, but I - - " (R. p. 31, line 24 – p. 32, lines 1-4). Counsel for Appellant responded, "I understand Judge. But to call it domestic violence when it's never been charged or there was never a chance for Mr. Green to face an accuser to have his, you know, chance to defend himself because there was never a charge brought." (R. p. 32, lines 5-9). The judge indicated that he was not inclined to suppress the prior bad act. (R. p. 32, lines 13-17).

At trial the prosecutor asked Hogges-Minus about the January incident and the judge noted Appellant's objection. (R. p. 111, line 20 – p. 112, lines 1-2). Hogges-Minus then was allowed to testify about the alleged January incident. (R. p. 112, lines 7-17). Hogges-Minus told the jury:

> We had an agreement to pick my child up from his mom's house. And when I got there, he arrived as I was getting – putting my daughter in the car. And he reached in and snatched my keys out my ignition and in the process of me trying to, you know, get my keys back – I was trying to like protect my daughter from seeing it. And he came around the front of the car and he grabbed my hair. And he pulled me to the ground by my hair and ripped my sewing out. And that's when he punched me. And his mom came off the porch and, you know, she was trying to get him off of me. And she called the police and made a report.

(R. p. 112, lines 7-17).

The trial judge erred in allowing the witness to testify that on a prior occasion Appellant assaulted her when the testimony was irrelevant and did not meet an exception pursuant to Rule 404(b). Additionally, the State failed to prove the alleged prior assault by clear and convincing evidence and finally the probative value of the alleged prior assault was substantially outweighed by the danger of unfair prejudice pursuant to Rules 403, 404(b), SCRE. The testimony constituted inadmissible propensity evidence.

First, the testimony about an alleged incident that took place almost a year prior was not relevant. In State v. Wallace, 384 S.C. 428, 433, 683 S.E.2d 275, 277 (2009) (footnote omitted), the South Carolina Supreme Court wrote, "The process of analyzing bad act evidence begins with Rule 401, SCRE. Pursuant to Rule 401, the trial court must determine whether the evidence is relevant. Upon determining the evidence is relevant, the trial court must then determine whether the bad act evidence fits within an exception of Rule 404(b) as interpreted by our jurisprudence." Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. The testimony about an alleged incident in January, almost one year earlier, did not make the existence of any fact of consequence in the attempted murder trial more or less probable. The testimony should have been excluded as irrelevant.

Second, the testimony did not meet an exception pursuant to Rule 404(b). In State v. Fletcher, 379 S.C. 17, 23–24, 664 S.E.2d 480, 483 (2008), the South Carolina Supreme Court wrote:

> Under Rule 404(b), SCRE, evidence of other crimes, wrongs, or acts is generally not admissible to prove the defendant's guilt for the crime charged. Such evidence is, however, admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006); State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). To be admissible, the 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, evidence of the prior bad act must be clear and convincing. Id.; State v. Beck, 342 S.C. 129, 135–36, 536 S.E.2d 679, 682–83 (2000). Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Rules 403 and 404(b), SCRE (although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice); State v. Gillian, 373 S.C. 601, 646 S.E.2d 872 (2007); State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001). The determination of the prejudicial effect of the evidence must be based on the entire record and the

result will generally turn on the facts of each case. State v. Bell, 302 S.C. 18, 393 S.E.2d 364 cert. denied, 498 U.S. 881, 111 S.Ct. 227, 112 L.Ed.2d 182 (1990).

The testimony about the alleged January incident constituted inadmissible evidence of an alleged prior bad act. The testimony about the alleged incident that took place almost a year prior did not show motive, identity, common scheme or plan, absence of mistake or accident or intent. The alleged prior incident involving only Hogges-Minus did not logically relate to the State's allegation that Appellant attempted to murder Hogges-Minus and her boyfriend when he saw them together a year after the prior alleged incident. Showing animus alone is not an exception pursuant to Rule 404(b).

Third, the State failed to prove the alleged prior bad act by clear and convincing evidence. As Appellant was not convicted of the alleged prior assault, the State was required to prove the alleged prior bad act by clear and convincing evidence. State v. Beck, 342 S.C. 129, 135-36, 536 S.E.2d 679, 682-83 (2000). "Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established. Such proof is intermediate more than a mere preponderance but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal." State v. Fletcher, 379 S.C. 17, 24, 664 S.E.2d 480, 483 (2008). The only person to testify about the alleged January incident was Hogges-Minus. Hogges-Minus testified that Appellant's mother was a witness to the January incident and called the police. (R. p. 112, lines 16-17). Appellant's mother, however, while called as a witness by the State at trial, was not questioned about the alleged January incident and was not called as a witness at the pre-trial hearing. The testimony should have been excluded because the State failed to prove the alleged January incident by clear and convincing evidence.

Fourth and finally, the probative value of the alleged prior assault was substantially outweighed by the danger of unfair prejudice pursuant to Rules 403, 404(b), SCRE. As discussed

above, testimony about the alleged incident in January of 2015, was irrelevant and not probative of the attempted murder charges that arose in December of 2015. The admission of the propensity evidence was unfairly prejudicial. The trial judge erred in allowing the witness to testify that on a prior occasion Appellant assaulted her when the testimony was not relevant, did not meet an exception pursuant to Rule 404(b), the State failed to prove the alleged prior assault by clear and convincing evidence and the probative value of the alleged prior assault was substantially outweighed by the danger of unfair prejudice pursuant to Rule 404(b), SCRE.

2. **The trial judge erred in allowing the witness to testify that on a prior occasion Appellant threatened to blow the witness's face off when the testimony was not relevant, did not meet an exception pursuant to Rule 404(b), the State failed to prove the alleged prior threat by clear and convincing evidence and the probative value of the alleged prior threat is substantially outweighed by the danger of unfair prejudice pursuant to Rule 404(b), SCRE.**

In addition to the alleged incident in January 2015, Appellant also moved to suppress an alleged prior bad act from Thanksgiving, 2015. Hogges-Minus testified at the pre-trial hearing that, "The week of Thanksgiving, he came to my house to try and fix my car. And I told him I didn't want him to do anything for me, that, you know, I didn't want him to do anything for me. And he was just like don't – me I'll blow your face off. And I told him to get out the yard and don't come back no more." (R. p. 14, lines 9-14). Hogges-Minus admitted that she did not call the police after this alleged threat by Appellant. (R. p. 26, line 24 – p. 27, lines 1-6). The judge ruled:

> Now, here with the Thanksgiving incident, it's more descriptive. And I think – but, of course, again, I think it's up to the jury whether or not they believe her in that situation. And right now, all of these motions are just essentially – I can change my mind. These are essentially Motions in Limine. But I'm inclined to let it in. It's close. It kind of goes along with the January event that shows the animus between them. And there are a couple of cases where there's domestic violence you can use that testimony later on, a prior domestic violence even in an assault and battery with intent to kill. And so I've got some cites here if you are interested, but I - - "

(R. p. 31, line 24 – p. 32, lines 1-4). As noted above, counsel for Appellant responded, "I understand Judge. But to call it domestic violence when it's never been charged or there was never a chance for Mr. Green to face an accuser to have his, you know, chance to defend himself because there was never a charge brought." (R. p. 32, lines 5-9). The judge indicated that he was not inclined to suppress the prior bad act. (R. p. 32, lines 13-17).

At trial the prosecutor asked Hogges-Minus about the Thanksgiving incident and the judge noted Appellant's objection. (R. p. 112, lines 18-22). Hogges-Minus then was allowed to testify about the alleged Thanksgiving threat incident. (R. p. 112, line 25 – p. 113, 114, lines 1-3). Hogges-Minus told the jury that Appellant and his brother came to her house to fix her car and she told him she did not want him to do anything for her. (R. p.112, line 25 – p. 113, lines 1-24). Hogges-Minus testified, "And he looked at me and said, don't play with me I'll blow your face off. And then I said that's the problem right there. I said get out of my yard and don't come back and leave me alone." (R. p. 113, line 25 – p. 114, lines 1-3).

The trial judge erred in allowing the witness to testify that on a prior occasion Appellant threatened her when the testimony was not relevant and did not meet an exception pursuant to Rule 404(b). Additionally, the State failed to prove the alleged prior threat by clear and convincing evidence and finally the probative value of the alleged prior assault was substantially outweighed by the danger of unfair prejudice pursuant to Rules 403, 404(b), SCRE. The testimony constituted inadmissible propensity evidence.

First, the testimony about an alleged prior threat was not relevant. In State v. Wallace, 384 S.C. 428, 433, 683 S.E.2d 275, 277 (2009) (footnote omitted), the South Carolina Supreme Court wrote, "The process of analyzing bad act evidence begins with Rule 401, SCRE. Pursuant to Rule 401, the trial court must determine whether the evidence is relevant. Upon determining

the evidence is relevant, the trial court must then determine whether the bad act evidence fits within an exception of Rule 404(b) as interpreted by our jurisprudence." Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. The testimony about an alleged threat to Hogges-Minus because she rejected Appellant's offer of help did not make the existence of any fact of consequence more or less probable as to whether Appellant attempted to murder Hogges-Minus and her boyfriend when he saw them together. The testimony should have been excluded as irrelevant.

Second, the testimony did not meet an exception pursuant to Rule 404(b). As discussed above in State v. Fletcher, 379 S.C. 17, 23–24, 664 S.E.2d 480, 483 (2008), the South Carolina Supreme Court wrote:

> Under Rule 404(b), SCRE, evidence of other crimes, wrongs, or acts is generally not admissible to prove the defendant's guilt for the crime charged. Such evidence is, however, admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006); State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). To be admissible, the 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, evidence of the prior bad act must be clear and convincing. Id.; State v. Beck, 342 S.C. 129, 135–36, 536 S.E.2d 679, 682–83 (2000). Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Rules 403 and 404(b), SCRE (although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice); State v. Gillian, 373 S.C. 601, 646 S.E.2d 872 (2007); State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001). The determination of the prejudicial effect of the evidence must be based on the entire record and the result will generally turn on the facts of each case. State v. Bell, 302 S.C. 18, 393 S.E.2d 364 cert. denied, 498 U.S. 881, 111 S.Ct. 227, 112 L.Ed.2d 182 (1990).

The testimony about the alleged threat constituted inadmissible evidence of an alleged prior bad act. The testimony about the alleged threat did not show motive, identity, common scheme or plan, absence of mistake or accident or intent. The alleged prior threat to Hogges-

Minus alone did not logically relate to the State's allegation that Appellant attempted to murder Hogges-Minus and her boyfriend when he saw them together. The alleged threat to Hogges-Minus because she rejected Appellant's offer of help did not provide a motive for Appellant to attempt to kill Hogges-Minus and her boyfriend. The motive exception might have been stronger if the prior alleged threat had been made to Hogges-Minus and her boyfriend rather than Hogges-Minus only.

While the federal rule of evidence differs slightly from the South Carolina rule, the Fourth Circuit uses a four prong test to determine the admissibility of prior act evidence. In United States v. Torrez, 869 F.3d 291, 301 (4th Cir. 2017) the Fourth Circuit wrote:

> Rule 404(b) "prohibits evidence of other crimes, wrongs, or acts solely to prove a defendant's bad character, but such evidence may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." United States v. Byers, 649 F.3d 197, 206 (4th Cir. 2011) (alterations and internal quotation marks omitted). This Court has articulated a four-prong test to determine the admissibility of prior-act evidence under Rule 404(b):
>
> (1) The evidence must be relevant to an issue, such as an element of an offense, and must not be offered to establish the general character of the defendant.... (2) The act must be necessary in the sense that it is probative of an essential claim or an element of the offense. (3) The evidence must be reliable. And (4) the evidence's probative value must not be substantially outweighed by confusion or unfair prejudice in the sense that it tends to subordinate reason to emotion in the factfinding process. United States v. Queen, 132 F.3d 991, 997 (4th Cir. 1997).

Applying the four-prong test of the Fourth Circuit, the alleged prior threat in the present case would not be admissible. As discussed above, the alleged prior threat against Hogges-Minus alone was not relevant. The alleged prior threat was not necessary to prove an element of the offense. As discussed below, evidence of the prior threat was not reliable and the probative value of the alleged prior assault was substantially outweighed by the danger of unfair prejudice.

The alleged prior threat is inadmissible under both Rule 404(b), SCRE and the four prong test provided by the Fourth Circuit.

As discussed in regard to the alleged January assault, the State failed to prove the alleged prior threat by clear and convincing evidence. As Appellant was not convicted of the alleged prior threat, the State was required to prove the alleged prior bad act by clear and convincing evidence. State v. Beck, 342 S.C. 129, 135-36, 536 S.E.2d 679, 682-83 (2000). "Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established. Such proof is intermediate more than a mere preponderance but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal." State v. Fletcher, 379 S.C. 17, 24, 664 S.E.2d 480, 483 (2008). The only person to testify about the alleged threat was Hogges-Minus. Hogges-Minus testified that Appellant's brother was a witness to the alleged threat but he was not called as a witness by the State. The testimony should have been excluded because the State failed to prove the alleged threat by clear and convincing evidence.

Finally, as also discussed above in regard to the alleged January assault, the probative value of the alleged prior threat was substantially outweighed by the danger of unfair prejudice pursuant to Rules 403, 404(b), SCRE. The testimony about the alleged threat because Hogges-Minus did not accept Appellant's offer to help repair her car was irrelevant and not probative of the attempted murder charges involving Hogges-Minus and her then boyfriend. The admission of testimony that Appellant allegedly threatened to "blow her face off" was unfairly prejudicial and constituted inadmissible propensity evidence. In State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998), the South Carolina Court of Appeals wrote:

> Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which

> tends to suggest decision on an improper basis. United States v. Bonds, 12 F.3d 540, 567 (6th Cir.1993); United States v. Rodriguez–Estrada, 877 F.2d 153, 156 (1st Cir.1989) ("[A]ll evidence is meant to be prejudicial; it is only *unfair* prejudice which must be avoided.").

The highly inflammatory alleged threat to "blow her face off" tends to suggest decision on an improper emotional basis. The testimony should have been excluded as more prejudicial than probative.

The trial judge erred in allowing the witness to testify that on a prior occasion Appellant threatened her when the testimony was not relevant, did not meet an exception pursuant to Rule 404(b), the State failed to prove the alleged prior threat by clear and convincing evidence and the probative value of the alleged prior assault was substantially outweighed by the danger of unfair prejudice pursuant to Rule 404(b), SCRE.

3. The trial judge erred in refusing to redact portions of a 911 call where the witness references an alleged prior threat by Appellant and tells the operator that Appellant is usually armed when the probative value of that portion of the tape is substantially outweighed by the danger of unfair prejudice pursuant to Rule 403, SCRE.

Prior to trial Appellant moved to redact portions of a 911 call where witness Hogges-Minus references an alleged prior threat by Appellant and tells the operator that Appellant is usually armed. (R. p. 4, line 12 – p. 5, p. 6 lines 1-22). Appellant argued that the probative value of that portion of the 911 tape was substantially outweighed by the danger of unfair prejudice. (R. p. 8, line 14 – p. 9, p. 10, lines 1-4). The prosecutor summarized the portions of the 911 tape and told the judge, "And about fifty-eight seconds then the operator asks Ms. Hodges, the caller, what is he chasing you for. And Ms. Hodges said, he's harassing me. I've done crashed – I mean, I've called the police. And then shortly thereafter she says, he'll be threatening to kill me and stuff and I've done filed a report. At another point, I think she says I

think he's got a gun. Nine times out of ten he'll have a gun." (R. p. 6, lines 13-20). The judge refused to require redaction of the 911 tape. (R. p. 10, lines 8-19).

At trial the State moved to introduce a non-redacted recording of the 911 tape as State's Exhibit #16. (R. p. 119, lines 1-8). The judge admitted the recording over Appellant's objection. (R. p. 119, lines 3-8). The trial judge erred in admitting the non-redacted recording of the 911 tape. The non-redacted portion of the 911 call contained improper character or propensity evidence and the probative value of that portion of the 911 tape was substantially outweighed by the danger of unfair prejudice.

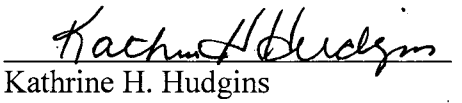
In State v. Gray, 408 S.C. 601, 609–10, 759 S.E.2d 160, 165 (Ct. App. 2014), the South Carolina Court of Appeals wrote:

> Rule 403 provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." "Probative" means "[t]ending to prove or disprove." *Black's Law Dictionary* 1323 (9th ed.2009). "Probative value" is the measure of the importance of that tendency to the outcome of a case. It is the weight that a piece of relevant evidence will carry in helping the trier of fact decide the issues. "[T]he more essential the evidence, the greater its probative value." United States v. Stout, 509 F.3d 796, 804 (6th Cir.2007) (internal quotation marks omitted). Thus, a court analyzing probative value considers the importance of the evidence and the significance of the issues to which the evidence relates.

Appellant's motion to redact portions of the 911 tape should have been granted. Neither the statement about an alleged prior threat against Hogges-Minus nor the statement that, according to her, Appellant was usually armed was essential to the State's case for the attempted murder of Hogges-Minus and her then boyfriend. The probative value of the 911 tape is in the narrative of Hogges-Minus describing the events leading up to shots being fired not in an alleged prior threat or her statement that Appellant was usually armed. Both statements are unfairly prejudicial and should have been redacted.

CONCLUSION

Based on the above arguments, this court should reverse Appellant's conviction and sentences and remand for a new trial.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 10th day of April, 2018.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

April 10, 2018

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