STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Chester County

Honorable Brian M. Gibbons, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

J.C. BOWLER,

APPELLANT

APPELLATE CASE NO 2017-001115

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred and abused its discretion in refusing to sever the charge of pointing and presenting a firearm from the charge of murder because the charges did not arise out of a single chain of circumstances, were not provable by the same evidence, and the pointing and presenting charge was prejudicial as it showed criminal propensity?

STATEMENT OF THE CASE

Appellant was convicted of murder and pointing and presenting a firearm at a jury trial held before the Honorable Brian Gibbons on April 24- 28, 2017, in Chester County. Appellant was sentenced to life imprisonment for murder and to five (5) years for pointing and presenting a firearm. Justin Jones, Esq. and William Frick, Esq. represented appellant. Candice Lively, Esq. and Randy Newman, Esq. were the assistant solicitors.

This appeal follows.

ARGUMENT

The trial court erred and abused its discretion in refusing to sever the charge of pointing and presenting a firearm from the charge of murder because the charges did not arise out of a single chain of circumstances, were not provable by the same evidence, and the pointing and presenting charge was prejudicial as it showed criminal propensity.

Appellant was indicted for pointing and presenting a firearm involving Stephine Gore on September 8, 2010. He was also indicted for the murder of Faris Wray on September 8, 2010, by means of shooting him. Both alleged incidents involved different people at different locations. During pretrial, the assistant solicitor, Lively, made a motion for prior bad acts evidence. On September 8 Stephanie Gore was visiting her daughter Crystal, who was living with appellant and the new baby they had. An argument started between appellant, Stephanie, and Crystal. Appellant went upstairs and came back down with a gun in his hand. Crystal called 911 and appellant left. Later in the day the victim, Faris Wray, was found shot to death. Faris Wray had had an earlier relationship with Crystal that also produced a child. Solicitor Lively's theory of the case was that because appellant pointed and presented a firearm earlier in the day he must have been the one who killed the victim. (R. p. 36, line 11- p. 6, line 19).

Stephanie Gore testified at the motion hearing that she went to visit her daughter and grandchild around 4:00 PM on September 8, 2010. An argument ensued and appellant went upstairs and came back downstairs with a black gun (R. p. 8, line 25- p. 9, line 16). When asked if he pointed the gun at her, she said "his aunt and mother grabbed his arms so he wouldn't point it at me." (R. p. 11, lines 1- 3). Crystal Gore said she never saw a gun but her mother said appellant had a gun. (R. p. 13, line 20- p. 14, line 12).

The trial court denied the State's motion to admit the prior bad act evidence pursuant to Rule 404 (b), SCRE finding that the evidence would be "substantially more prejudicial than probative." (R. p. 20, lines 21- 25).

Defense counsel was concerned about appellant being tried on the indictment for pointing and presenting and asked that it be severed from the murder charge because, as the judge said, it would be more prejudicial than probative because it would introduce in the jury's mind that appellant possibly had a gun earlier in the day. (R. p. 21, line 2-12).

The assistant solicitor then complained that she could not prove her case without the pointing and presenting charge. The trial court's response, "Motion to sever is denied." (R. p. 22, line 25- p. 24, line 18).

Of course, assistant solicitor Lively had to bring up the pointing and presenting charge in her opening argument. (R. p. 28, lines 12-22; R. p. 30, line 23- p. 31, line 15). If it is more prejudicial than probative to appellant you can't blame her for arguing it. She also brought it up in her closing argument. (R. p. 256, lines 18-20; R. p. 257, line 19- p. 258, line 15; R. p. 261, line 22- p. 263, line 3).

Prior to Crystal Gore and Stephanie Gore testifying in front of the jury, defense counsel again renewed his objection to the prior bad act testimony and the severance motion. (R. p. 119, lines 16- 24).

The trial court made the following ruling:

> And while I do agree with the defense that it is in violation of 404B, and I think I stated that in my ruling yesterday, the State has elected to proceed on both indictments for the trial of this case. No motion to sever was ever filed or presented by the defense until after the 404B issue was ruled upon, and it was upon that basis that the Court denied the motion to sever, okay?

(R. p. 119, line 25- p. 120, line 7).

The State then called Crystal Gore to testify. She said she did not see appellant with a gun on September 8, 2010. (R. p. 126, lines 12- 15). Stephanie Gore testified that they were arguing, appellant went upstairs and when he came back down he had a black gun in his hand. (R. p. 129, lines 21- 23). On cross-examination, she was asked if appellant ever pointed the gun at her. She replied, "When he came down he had the gun and his aunt and his mom grabbed his arms and was pulling him out the door." (R. p. 133, lines 11-13).

The trial court's decision not to sever the pointing and presenting charge was an abuse of discretion. In State v. Smith, 322 S.C. 107, 470 S.E.2d 364 (1996) the Court wrote:

> Where the offenses charged in separate indictments are of the same general nature involving connected transactions closely related in kind, place and character, the trial judge has the power, in his discretion, to order the indictments tried together if the defendant's substantive rights would not be prejudiced. (Citations omitted).

In this case the charges of pointing and presenting and murder did not arise out of a single chain of circumstances and were not provable by the same evidence. The pointing and presenting charge was also prejudicial because it wrongly showed criminal propensity. If appellant pointed and presented a gun earlier in the day, he must have been the one who shot the victim later that evening. As already noted, the trial judge found the evidence to be substantially more prejudicial than probative."

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).

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). Futhermore, 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 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 95 (1977). (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 poison 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 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 error in this case was not harmless. The victim in this case was shot on September 8, 2010. The case did not go to trial until April 24, 2017. No gun was ever found, there was no gunshot residue, no fingerprints, no DNA, no video. Out of all the witnesses who were at the scene only one testified appellant as the shooter. (R. p. 91, lines 2- 5). Pauline Caldwell, a cousin of the victim, testified that she saw the victim lying in a ditch after he had been shot. He told her appellant shot him. (R. p. 43, lines 16-17; R. p. 45, lines 16-19) On cross-examination she admitted she did not come forward with this information until seven years later. In all that time

she never told the rest of the family what the victim told her. (R. p. 55, lines 22-25). The State's case was hardly one of overwhelming evidence.

CONCLUSION

Appellant's convictions should be reversed.

Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 19th 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 19, 2018

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