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ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Chester County

Honorable Paul M. Burch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JERMAINE MARQUEL BELL,

APPELLANT

APPELLATE CASE NO. 2017-001500

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial judge erred in allowing the decedent's husband and daughter to testify to the decedent's hearsay statements that she said she believed appellant was stealing her clothing, including her underwear, over appellant's objections, including Rule 404(b) and Rule 403, SCRE, and admitting the hearsay under the solicitor's claimed state-of-mind exception?

STATEMENT OF THE CASE

On February 16, 2016, a Chester County grand jury indicted appellant for murder. R. __. On June 26, 2017, appellant was tried before the Honorable Paul M. Burch and a jury. Tr. 1. Candace Lively and Randy Newman represented the State. Tr. 1. William Frick and Justin Jones represented appellant. Tr. 1. The jury convicted appellant. Tr. 623, ll. 7 – 12. Judge Burch sentenced appellant to life imprisonment. Tr. 631, l. 8 – 632, l. 3. This appeal follows.

ARGUMENT

The trial judge erred in allowing the decedent's husband and daughter to testify to the decedent's hearsay statements that she said she believed appellant was stealing her clothing, including her underwear, over appellant's objections, including Rule 404(b) and Rule 403, SCRE, and admitting the hearsay under the solicitor's claimed state-of-mind exception.

Factual Background

Very little evidence connected appellant to the decedent's death. Appellant was interrogated repeatedly for multiple hours and denied any involvement in the death of Judy Lindsay ("Lindsay"). Tr. 510, ll. 8 – 21. Tr. 225, l. 9 – 226, l. 21. Lindsay was found naked in some bushes behind an abandoned house an approximately two-or-three-minute walk from where she lived. Tr. 206, l. 9 – 207, l. 22. Drag marks led from her house to her body that were clearly visible to the K-9 officer who found her body. Tr. 206, l. 9 – 207, l. 22. Her common-law husband, Mitchell Mayfield ("Mayfield"), called the police on a Sunday morning after finding some of her clothing in the yard and following the drag marks into the grass. Tr. 121, l. 15 – 125, l. 10. Mayfield noticed the clothing in the yard when he went outside to burn his trash in a burn barrel, which he testified was part of his morning routine. Tr. 117, ll. 11 – 18. The burn barrel was still smoldering when the police investigated. Tr. 479, ll. 11 – 21. (Defendant's Ex. 1 and 3).

Lindsay died from a brutal manual strangulation. Tr. 266, l. 6 – 267, l. 4. She had injuries to her genitals and anal area. Tr. 264, ll. 9 – 22. When asked about the struggle, the pathologist testified about "signs of force" on Lindsay's inner arms and armpits, that there were "abrasions over the body" and she had bitten her tongue. Tr. 263, ll. 2 – 7. When the police

interviewed appellant for nine hours soon after they found Lindsay's body, they documented no injuries on him. Tr. 225, l. 9 – 226, l. 21. Tr. 308, l. 24 – 309, l. 8.

Appellant was a frequent social visitor to Lindsay's house. Tr. 160, l. 17 – 162, l. 11. He was friends with Lindsay's daughter, Jet, who lived at the house. Tr. 161, ll. 9 – 12. Tr. 160, ll. 11 – 12. Sometimes Lindsay did not want appellant at the house, but other times she would let him stay if he brought her a soda. Tr. 161, l. 20 – 162, l. 11.

The weekend Lindsay was murdered, appellant spent Friday night at her house. Tr. 163, l. 25 – 164, l. 5. Also staying at the house were Mayfield, Jet, and three children. Tr. 162, l. 21 – 163, l. 24. On Saturday evening, Lindsay, Jet, and appellant sat on Lindsay's porch, drinking, talking, and having fun. Tr. 165, l. 20 – 166, l. 16. Lindsay did not drink alcohol, but Jet and appellant were drinking. Tr. 165, l. 24 – 167, l. 11. Jet had called appellant over to join them and gave him a shot of liquor when he came on the porch. Tr. 166, l. 12 – 167, l. 11.

Around 12:30-12:45 AM, Jet went to bed. Tr. 168, l. 19 – 170, l. 12. Lindsay said she would come to bed soon after she smoked her last cigarette. Tr. 169, ll. 2 – 12. Jet went to bed and left appellant and her mother on the porch. Tr. 170, l. 13 – 171, l. 20. Appellant "was acting like his normal self" according to Jet. Tr. 169, ll. 13 – 14.

Mayfield had an argument with Lindsay on Saturday morning and denied seeing her the rest of the day. Tr. 118, l. 3 – 119, l. 21. Mayfield went to work and was already in bed when Lindsay returned from a church event. Tr. 119, ll. 7 – 21. He woke up the next morning around 5:00 or 6:00 AM. Tr. 120, l. 24 – 121, l. 5. He fixed coffee and went outside to burn his trash. Tr. 121, ll. 6 – 14. While burning his trash, he noticed Lindsay's scarf, socks, and shoes in the yard. Tr. 121, ll. 15 – 17. Mayfield said this "didn't seem right." Tr. 121, ll. 15 – 22. He assumed his grandchildren left them in the yard, so he went inside and awakened Jet to tell her to

make the children clean the yard. Tr. 122, ll. 2 – 11. Mayfield guessed he was outside by 7:00 or 7:15 AM. Tr. 152, ll. 20 – 23.

Mayfield assumed Lindsay spent the night in Jet's room. Tr. 123, ll. 2 – 17. When he awakened Jet, he learned Lindsay was not in the house. Tr. 123, ll. 13 – 17. Jet began calling people looking for her mother. Tr. 123, ll. 18 – 21. Jet "started freaking out." Tr. 172, ll. 14 – 19. She called friends and family members, including appellant. Tr. 172, l. 14 – 173, l. 3. She rode around with a family friend looking for her mother. Tr. 173, ll. 13 – 23.

Mayfield went back outside and noticed drag marks near Lindsay's shoes and scarf. Tr. 124, ll. 5 – 10. He followed the drag marks and saw Lindsay's keys and shirt. Tr. 124, ll. 19 – 24. He then called 911. Tr. 124, l. 19 – 125, l. 10. The first police officer on the scene was dispatched at 9:35 AM and arrived at 9:41 AM. Tr. 194, ll. 9 – 12. Tr. 189, ll. 18 – 19. That meant, according to Mayfield's timeline, at least two-and-a-half hours elapsed between when he was outside burning trash and noticed the clothing until he called 911. Tr. 152, l. 20 – 155, l. 7. Defense counsel cross-examined Mayfield about the discrepancies in his timeline. Tr. 152, l. 20 – 155, l. 7.

Once the police arrived and secured the scene, several people in the neighborhood came and talked to the police. Tr. 191, l. 11 – 193, l. 5. Appellant also came to the scene. Tr. 192, l. 16 – 193, l. 5. The police learned appellant was one of the last people to see Lindsay and asked if he would speak to them. Tr. 192, l. 16 – 193, l. 5. He replied, "No problem." Tr. 192, l. 16 – 193, l. 5.

A K-9 officer arrived and the dog found Lindsay's body within two or three minutes of being placed on the scent from the clothing in the yard. Tr. 206, ll. 9 – 11. Crime scene investigators collected the evidence from the scene and DNA swabs were taken from Lindsay's

body and from the underarm portions of her shirt. Tr. 430, l. 6 – 486, l. 2. Tr. 364, l. 6 – 365, l. 12. Tr. 264, l. 5 – 265, l. 15. Also at the autopsy, the pathologist conducted a sexual assault examination, collected fibers, clipped fingernails, combed pubic hair, and checked for body fluids. Tr. 264, l. 5 – 265, l. 15.

The State's best evidence against appellant came as a result of the DNA swabs of Lindsay's shirt and neck. Tr. 398, l. 2 – 408, l. 4. The SLED DNA expert used both STR DNA testing and YSTR DNA testing and concluded that appellant's DNA could not be excluded from a mixture found in these areas. Tr. 398, l. 2 – 408, l. 4. The probability of the DNA matching appellant on the swab from the neck was 1/10 for the STR test and 1/8600 for the YSTR test. Tr. 398, l. 2 – 408, l. 4. The probability of the DNA matching appellant on the swab from the shirt was 1/960 for the STR test and 1/8600 for the YSTR test. Tr. 398, l. 2 – 408, l. 4. The YSTR test only examines the male side of the chromosome and related males will have the same results. Tr. 398, l. 2 – 408, l. 4. The SLED expert admitted there is no way to know how long touch DNA remains on a person or object. Tr. 367, ll. 9 – 15.

During the multiple hours of interviews, the best evidence the police could muster against appellant was that he was inconsistent about where he spent the night and his choice of clothing. Tr. 526, l. 2 – 528, l. 14. Appellant never admitted any involvement in Lindsay's death despite the police using sophisticated interview techniques and lying to him about the evidence they recovered. Tr. 532, ll. 19 – 21. Tr. 530, ll. 19 – 22. Tr. 510, l. 8 – 515, l. 17. He denied the police would find his DNA on Lindsay. Tr. 534, ll. 20 – 21.

The police looked at several suspects in the case. Tr. 523, ll. 13 – 17. Tr. 520, ll. 15 – 17. They conducted forensic interviews of the children in the house and learned nothing. Tr. 496, l. 12 – 497, l. 11. They did "phone dump[s]" and found nothing. Tr. 501, ll. 11 – 14. They

collected video from a camera across the street that showed a car drive "up and down the road with the lights come up" but could not see anything else nor identify the car. Tr. 302, ll. 3 – 21.

Ervin Chalk, who knew appellant and saw him earlier that day at a party, testified he saw appellant walking around at approximately 3:30 AM. Tr. 330, ll. 11 – 23. Tr. 331, ll. 16 – 21. Chalk said he only had three beers between 7:00 PM and 3:30 AM when he went to a party then to a club. Tr. 332, l. 4 – 333, l. 15. Darkarious Woods was a volunteer firefighter familiar with neighborhood who knew Lindsay's family and appellant. Tr. 284, ll. 2 – 19. Tr. 291, ll. 16 – 22. He was driving in front of Lindsay's house at approximately 1:00-1:30 AM and saw no one on her porch. Tr. 284, l. 15 – 287, l. 19. From his experience with the fire department, Woods knew "there's a lot of activity going over there a lot, you kind of be on your P's and Q's and aware of your surroundings." Tr. 286, ll. 7 – 12. Appellant came up to Woods' car from the side of a neighboring house and asked Woods if his car was new. Tr. 286, ll. 4 – 23. Woods said this was weird because appellant had washed Woods' car before. Tr. 286, ll. 16 – 23. Woods further described appellant as "jittery." Tr. 291, ll. 1 – 7. Woods did not give a statement to the police until three days after Lindsay's body was found even though he went to the scene while the police were investigating. Tr. 294, l. 4 – 295, l. 8. Mayfield was Woods' uncle. Tr. 284, ll. 2 – 5.

After the police finished their investigation and released the scene, Mayfield called the police back because he found a plastic bag with Lindsay's underwear. Tr. 129, l. 10 – 130, l. 13. Tr. 459, l. 16 – 460, l. 6. Tr. 472, l. 3 – 473, l. 20. (Defendant's Ex. 9, 10). The crime scene investigator admitted that the bag's presence was "odd." Tr. 473, ll. 6 – 16. The bag was found near where the police recovered Lindsay's body and the crime scene investigator said they did not see the bag during their hours at the scene. Tr. 468, l. 8473, l. 13. Mayfield claimed he

found the bag in the bushes where Lindsay's body was found. Tr. 155, ll. 13 – 23. As defense counsel argued at closing, based on the bag's location, if the police missed the bag then nothing they said was credible or the bag "showed up later." Tr. 566, l. 15 – 567, l. 12.

The Objections and the Trial Court's Rulings

The State tied the bag of Lindsay's underwear to appellant through inadmissible testimony. Tr. 114, l. 18 – 115, l. 13. Tr. 176, l. 10 – 177, l. 5. Mayfield was the State's first witness and on direct-examination the following testimony and objections occurred:

> Q. Now, getting closer to the time of September 2015, had any other problems arose regarding the defendant, Jermaine Bell, between you and your wife, Judy?
>
> A. No. Now, at a point in time they—Judy had told me Jermaine was stealing.
>
> Q. Someone was stealing?
>
> MR. FRICK: Objection, Your Honor.
>
> MS. LIVELY: Goes to the state of mind, Your Honor.
>
> MR. FRICK: 404-B.
>
> THE COURT: I'm going to give her a little leeway on it, I will overrule the objection. Go ahead.
>
> MS. LIVELY: Thank you, Your Honor.
>
> Q. So she believed that the defendant was stealing.
>
> A. Yes.
>
> Q. Stealing what?
>
> A. Her glasses, money, cigarettes, clothes.
>
> Q. But you didn't have any proof of this; is that correct?
>
> A. Not then.
>
> Q. Did you call the police?

A. Well, no.

Q. All right. But this was something that Ms. Judy had mentioned to you.

A. Yeah.

Tr. 114, l. 18 – 115, l. 15. The solicitor again elicited this testimony through Jet, the State's second witness:

> Q. Now Jessica, did your mom have a problem—you've mentioned—I asked about him coming over to the house, did she have a problem with him just in general?
>
> A. I don't know.
>
> Q. Had she ever explained to you about anything that he had done?
>
> A. Yeah, stealing stuff from her.
>
> MR. FRICK: Objection, Your Honor, same as before, 403.
>
> MS. LIVELY: Goes to the state of mind, Your Honor.
>
> THE COURT: Overruled.
>
> Q. What kind of items had she said—and I understand—did she ever call the police on him for stealing stuff in her house?
>
> A. No, ma'am.
>
> Q. But she—did she tell you that he'd taken stuff or she believed him to have?
>
> A. Yes, ma'am.
>
> Q. What were those items, do you remember?
>
> A. Her glasses, underclothes, by underclothes I mean underwear.
>
> Q. All right. Did you ever confront him about that?
>
> A. No, ma'am.
>
> Q. Do you know if your mom had?
>
> A. I'm not sure.

Tr. 176, l. 6 – 177, l. 5. The solicitor repeatedly alluded to this testimony in closing argument, speculating that appellant had hiding places for what he stole and that perhaps appellant killed Lindsay because she "probably confronted him about her stolen items, maybe she was just sick of it, unfortunately we will never know because he killed her. Maybe it was a sexual rejection, remember, we don't have to prove that." Tr. 596, ll. 6 – 10. Tr. 602, ll. 2 – 10. Tr. 608, ll. 14 – 15. Tr. 609, l. 23 – 610, l. 4.

Discussion

The trial judge erred in admitting the hearsay evidence that appellant was stealing from Lindsay under the state of mind exception. See Rule 803(3), SCRE. Furthermore, evidence of appellant's alleged prior bad acts are not admissible under Rule 404(b) unless proved by clear and convincing evidence. See Rule 404(b), SCRE. State v. Fletcher, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008) ("If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing."). Finally, the hearsay allegations about appellant were substantially more unfairly prejudicial than probative. See Rules 403, 404(b), SCRE. Fletcher at 23-24, 664 S.E.2d at 483.

The State's claimed exception—state of mind—does not apply to the hearsay testimony about appellant stealing Lindsay's clothing. The state of mind exception, found in Rule 803(3), only applies to a statement of the declarant's "then existing state of mind, emotion, sensation, or physical condition. . . ." Rule 803(3), SCRE. It does not apply to "a statement of memory of belief to prove the fact remembered or believed. . . . " Rule 803(3), SCRE.

Here, Lindsay is the declarant. The hearsay statement is she believed appellant was stealing. Nothing in this statement meets the first part of the rule. It does not indicate that Lindsay was angry or scared or frustrated. Her state of mind is not revealed. The statement,

however, falls squarely within the exclusionary part of Rule 803(3) because it is Lindsay's statement of belief to prove a fact remembered. Lindsay believed appellant was stealing—the fact remembered.

The interpretation of Rule 803(3) as preventing admission of facts showing the reason for the declarant's state of mind further demonstrates the trial court's error. State v. Garcia, 334 S.C. 71, 512 S.E.2d 507 (1999). In Garcia, two hearsay statements were challenged. Id. at 73-74, 512 S.E.2d at 508. The first statement was that the decedent said she got a bruise when the defendant kicked her. Id. The second statement was that the decedent said she was afraid of the defendant because he threatened to kill her and her family if she ever left him. Id. The Court held, "While their testimony presents circumstantial evidence of the decedent's fear of appellant and concern for her safety, the testimony improperly reveals the reason for her state of mind (i.e., that appellant had kicked and threatened to kill her." Id. at 76, 512 S.E.2d at 509-10.

The Garcia Court quoted with approval United States v. Cohen, 631 F.2d 1223, 1225 (5th Cir. 1980)'s clear explanation of the exception:

> But the state-of-mind exception does not permit the witness to relate any of the declarant's statements as to why he held the particular state of mind, or what he might have believed that would have induced the state of mind. If the reservation in the text of the rule is to have any effect, it must be understood to narrowly limit those admissible statements to declarations of condition—'I'm scared—and not belief—'I'm scared because [someone] threatened me.'

Garcia at 76, 512 S.E.2d at 509. Under this interpretation, had Lindsay told her husband or Jet she was afraid or angry, that hearsay would be admissible. However, the hearsay regarding appellant stealing is the inadmissible "reason for her state of mind" as shown in Garcia. See also State v. Daise, 421 S.C. 442, 460-61, 807 S.E.2d 710, 719 (Ct. App. 2017) (holding hearsay improperly admitted under Rule 803(3) because it was the reason for the declarant's fear of the defendant); State v. Hughes, 419 S.C. 149, 156-57, 796 S.E.2d 174, 178-79 (Ct. App. 2017)

("These statements were inadmissible because they not only revealed Victim's state of mind, they described the reasons for her state of mind."); Vail v. State, 402 S.C. 77, 87, 738 S.E.2d 503, 508-09 (Ct. App. 2013) (applying interpretation of Garcia and ruling declarant's statements did not fit within Rule 803(3)). The trial court erred in accepting the State's argument that the testimony was admissible.

Even if the hearsay statements were somehow admissible under Rule 803(3), they were still inadmissible under Rule 404(b) as prior bad acts. The prior bad act is that appellant stole items from Lindsay. Prior bad act evidence is usually offered through the victim of the bad act, not hearsay. See, e.g., State v. Scott, 405 S.C. 489, 748 S.E.2d 236 (Ct. App. 2013) (holding that testimony of two prior victims of uncharged sexual abuse could testify about prior bad acts pursuant to Rule 404(b)). Assuming the State offered these prior bad acts to prove motive, the trial court made no finding that the proof that appellant stole items met the clear and convincing burden of proof. Fletcher at 23, 664 S.E.2d at 483. Nor could the trial court have found the State met its burden because the solicitor asked Mayfield, "But you didn't have any proof of this; is that correct?" and Mayfield answered, "Not yet." Tr. 115, ll. 9 – 11. Similarly, Jet never offered any evidence to prove appellant stole items but testified only to Lindsay's unsubstantiated belief. Tr. 176, l. 10 – 177, l. 5. Jet never confronted appellant about stealing and was unsure whether Lindsay had confronted him. Tr. 176, l. 10 – 177, l. 5. No one ever reported the alleged thefts to the police.

Furthermore, the evidence was inadmissible under Rule 403. See Rule 403, SCRE. The unfair prejudice was the speculation that appellant was stealing women's underwear. This portrayed appellant as a pervert and a thief. The probative value—that appellant's motive for the crime was that he lusted after Lindsay sexually—is so tenuous as to be nonexistent. The trial

judge failed to make any ruling weighing the probative value against the unfair prejudice and because of the negligible probative value, the evidence was inadmissible. State v. Collins, 409 S.C. 524, 533-37, 763 S.E.2d 22, 27-30 (2014) (explaining balancing courts must conduct under Rule 403).

In this case with no direct evidence of appellant's guilt and very little circumstantial evidence, the erroneous admission of this testimony cannot be harmless. The State used this testimony to link appellant to the bag of Lindsay's underwear—found only after the police had left the scene and reported by Mayfield. The State also used this testimony to speculate about a motive for the crime. The State theorized that appellant was sexually attracted to Lindsay or perhaps that Lindsay confronted appellant about the thefts, but admitted that it could not prove these theories. The speculation gave the State a way to explain why appellant—who was friendly with the family and had spent the previous night at the house and, according to Jet, was acting normal that night—would murder Lindsay. The inadmissible hearsay and bad acts also gave the jury the impression that appellant was a thief and a sexual pervert. The trial court's error prejudiced appellant and this Court should reverse.

CONCLUSION

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

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 18th day of April, 2018.